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No. 9469.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ARMATURE EXCHANGE, INCORPORATED, a corporation, also known as THE ARMATURE EXCHANGE, a corporation, also known as THE ARMATURE EXCHANGE, INCORPORATED, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE UNITED STATES.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

STATUTE.

MISCELLANEOUS.

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Appellee.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The opinion of the District Court [R. 11] is reported in 28 F. Supp. 10.

Jurisdiction.

This is an appeal from a judgment of the District Court entered September 13, 1939 [R. 41], in the amount of $1,452.30, without interest, assessed and paid as manufacturer's excise taxes. Notice of appeal was filed December 12, 1939. [R. 42-43.] The jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether *sales* of automobile armatures by appellee were taxable under the statute imposing tax upon automobile parts, "sold by the manufacturer, producer, or importer" thereof.

Statute and Regulations Involved.

The applicable statute and regulations will be found in the Appendix, *infra,* pages 31-32.

Statement.

The case was tried to the Court without a jury, and the evidence consisted of the testimony of three witnesses for appellee, together with numerous exhibits and documentary evidence adduced by each of the parties. After oral argument the Court rendered an oral opinion [R. 11-26], and subsequently filed findings of fact and conclusions of law in favor of appellee. [R. 28-40.] The facts, as disclosed by the undisputed evidence, may be summarized as follows:

Appellee was incorporated under the laws of California [R. 28] "to carry on the business of manufacturing and assembling armatures, motors and electrical equipment of any and all kinds. To design and prepare plans and specifications for the manufacture, construction and assembling of electrical appliances and equipment. To enter into contracts and make the necessary agreements for marketing and disposing of the same * * *." [R. 106.]

The following is a summary of appellee's major processes and operations in the production of armatures by combining new materials with usable parts salvaged from used and worn out armatures:

The used and worn out armatures were placed in a lathe and the wires leading from the core to the commutator were cut out with a knife as the lathe revolved. (Joint Ex. No. 1, p. 1.)

The cores were then heated over a gas flame for about 20 minutes (the flames coming up from a range within the metal box shown in Joint Exhibit No. 1, p. 2). The purpose of the heating was to loosen the old wires and old insulation so that they might be easily removed. (Joint Ex. No. 1, p. 2.)

After the units were laid out on a metal top table and slightly cooled, they were placed in a V-shaped slot, and a steel chisel was driven down between the mass of old wires which had been loosened by heating, and the old wires were pried out. (Joint Ex. No. 1, p. 3.)

The stripped units were then placed in a machine equipped with a small saw that reslotted each commutator bar at the place where the old wires were soldered in (*i. e.*, at the end of the commutator closest to the core). This machine was operated by suspending the shaft on which the core and commutator were mounted between a clamp, and the saw-blade about one and one-half inches in diameter was moved up to each slot by means of a lever, and the shaft was rotated by hand. Any solder remaining in the slots was removed with a small metal pick. (Joint Ex. No. 1, p. 4.)

The placement of the commutator on the shaft was checked with a pair of calipers by measuring from the point on the shaft where the bearing rode to the front end of the commutators. The distance from the core to the commutator was measured with a metal rule. (Joint Ex. No. 1, p. 5.)

Any errors in the mounting of the core or commutator on the shaft were corrected by means of adjusting their respective placements by means of an arbor press. The laminations of almost every core were pressured together on this same press before any further steps were taken. This latter operation was done to realign any laminations which might have become somewhat separated. (Joint Ex. No. 1, p. 6.)

A test was given to insure that none of the bars on the commutator were grounded to the shaft, or shorted. This was done by rotating the end of a live wire over the commutator, and at the same time having the shaft grounded. (Joint Ex. No. 1, p. 7.)

Then each portion of the shaft leading from each side of the core was insulated by approximately five wrappings of paper around the shaft as it protruded from each end of the core. The insulation was about an inch or so in length. Each slot in the core was also insulated by placing therein a folded insulating paper approximately the size of a cigarette paper; and each surface end of the core was insulated with a heavy pressed cardboard which had been stamp-cut the shape of the surface ending of the core. This is illustrated in Joint Ex. No. 1, p. 8, in which all three types of insulation are shown. (Joint Ex. No. 1, p. 8.)

Approximately 95% of the armatures were wound on a Chapman winder, designed to wind armatures with fourteen-slot cores. Those which had a different number of slots had to be wound by hand. This machine had a lathe, in which were two jaws that held the laminated core in such a manner that the shaft extended perpendicularly from the axis of the lathe an equal distance in each direction. Two strands of wire led from two different reels

up through the top of the machine, over pulleys and down to the armature in the jaws of the lathe. Two sizes of wire (Nos. 16 and 17) were used in the winding, depending upon the electrical output expected out of the generator; *i. e.,* a heavier wire can give a greater output. Each coil was wound with six complete turns. On each turn, the wire in the slot on one side of the core led into the slot on the direct opposite side of the core. There were two coils in each slot, making, therefore, in the case of a fourteen-slot core, twenty-eight coils. Upon the completion of each coil, that is, after six turns, the wire was laid up over the commutator-end of the shaft, and, at the conclusion of the next coil following, that particular wire was cut near the commutator-end of the shaft and the lead end of the wire folded back. However, the lead ends on the top coils of the half of the core that was lastly wound were not cut by the winder operator, because there was no necessity of cutting them, but they were left suspended in a loop over the commutator end of the shaft. The only reason for cutting the other wires was because they were from coils that were underneath and, if they were not cut, the wire from the top coil would bind them down to the shaft. (Joint Ex. No. 1, p. 9.)

The armature was then placed in a lathe-like clamp, called a bench center, which clamp suspended the armature by holding it at each end of the shaft. Then all of the wires which were not previously cut by the operator on the winding machine were cut, and this left fifty-six leads, with two leads to each coil, and two coils to each slot. Wooden wedges were then driven over the top of the wires and into each slot of the laminated core, as shown in Joint Ex. No. 1, p. 10. This was for the purpose of holding the wires in the slots. (Joint Ex. No. 1, p. 10.)

The leads were pulled down in three equal groups and the ends of the leads inserted into an electrically driven machine with two wire rollers operating in opposite directions, which cleaned all of the insulation from the leads for a distance of about two inches from the ends of the leads. These leads extended approximately four inches out of the slots of the core. (Joint Ex. No. 1, p. 11.)

The leads from the top coils were folded back over the core, and then the leads from the bottom coils were similarly folded back. This was only for the purpose of making them easily available to the operator when he was connecting them with the commutator. There were four sets of leads, corresponding with the sets of coils in the armature. These leads were inserted firmly in place by means of a small chisel. As the leads were connected, the operator rotated the armature. A connection of a set of leads was completed with each rotation. As each complete rotation was made, the wires which then lead from the core to the commutator were insulated by wrapping with insulating paper approximately one and one-half inches in width. Since there were four complete sets of leads, this made three sets of insulation, the top leads being exposed. Twine was then wrapped around just behind the commutator with about seven turns so in the event the soldering holding the leads into the commutator became hot, the cord would still keep the leads in place. (Joint Ex. No. 1, p. 11.)

Solder flux was painted around the commutator where the wires had been tapped into the slots. The whole com-

mutator was then immersed into solder, the solder only adhering to the band where the flux had been applied. (Joint Ex. No. 1, p. 12.)

The armatures were then placed on end in a tray, and the tray was lowered into an insulating varnish, where it remained for about 15 or 20 minutes, so that the cotton insulation of the wire would be completely saturated. The tray was then raised, and the armatures drained for approximately 30 minutes. (Joint Ex. No. 1, p. 13.)

The armatures were placed in an electric oven and baked overnight at a temperature of about two hundred and fifty degrees. The total day's production was generally dipped and baked at one time. (Joint Ex. No. 1, p. 14.)

The armature was taken from the oven and placed in a lathe where the commutator was planed down sufficiently to true the brush surface of the commutator. (Joint Ex. No. 1, p. 15.)

The end of the shaft of the armature was placed in a chuck and was rotated, and by applying an abrasive cloth to the surface of the laminated core, the shaft and the commutator, the same were polished, and all the excess varnish was removed from the metal. (Joint Ex. No. 1, p. 16.)

The armature was then placed between centers and a small saw blade, approximately one-quarter inch in diameter, cut the level of the mica insulation between the commutator bars to a level below that of the surface of the bars of the commutator. (Joint Ex. No. 1, p. 17.)

The armature was tested for shorts. This was done by placing the armature onto a magnetic growler (that is, by setting the core part on the magnet) and if there was a short in the armature, a thin metal blade would be attracted to the core, as shown in Joint Ex. No. 1, p. 18.

The armature was tested to see if it was grounded by touching one wire to the shaft and the other to the commutator, and if it was grounded, the connection was made and a light attachment was illuminated. (Joint Ex. No. 1, p. 19.)

The shafts were then checked for undersize with a micrometer. If the shaft was too far undersize, it had to be knurled or sleeved. The process of knurling is illustrated in Joint Ex. No. 1, p. 20. The shaft was roughened so that it would fit snugly with a bearing. If the shaft was too small to be knurled, it had to be turned down on a lathe and a metal sleeve driven over it. About fifty per cent of the shafts had to be knurled, and about fifteen per cent had to be sleeved. (Joint Ex. No. 1, p. 20.)

The armatures were then finally checked by rotating the commutators under a micrometer. This was done for the purpose of insuring that every bar of the commutator was of approximately the same height, otherwise proper contact with the generator brushes would not be made. This test is illustrated in the picture on the left side of Joint Ex. No. 1, p. 21. The ends of the shafts were then rethreaded and the armatures were ready for boxing. (Joint Ex. No. 1, p. 21.)

One of the final steps consisted in stamping appellee's trade-name "Armex" into the laminated core. [R. 102.]

Thereafter the same were separately boxed and labelled, as shown by photographic exhibit No. 14. [R. 77.] The armatures were sold by appellee mostly to jobbers on the exchange basis of sale for replacement parts, that is, the selling price was paid partly in cash and partly by an allowance made for a used article taken in trade. The appellee's catalog list prices ranged from $2.50 to $22.50. [R. 82, 95.] The catalog prices were subject to jobbers' discount. [R. 93.] If a sale was made to a customer who did not bring in an old armature, an added charge was made of from 50¢ to $1. [R. 95.] The appellee also purchased worn out armatures from junk men for use in its operations. [R. 95, 97.] Usually about 3,000 armatures were on hand in all of the various stages, of which 1,000 armatures were in complete form and ready for sale. [R. 80.] The 1,000 articles represented about 600 different types of armatures. [R. 81.] Sales transactions involved from one to as many as 40 or 50 armatures. [R. 82.]

Approximately 14 or 15 men were employed in appellee's armature operations and about 80 armatures were turned out, checked, boxed and put on the shelves daily. [R. 83.] The armatures so produced by appellee were merchantable and quality products and so represented. They were sold by leading jobbers under appellee's own trade name and catalog code number and were guaranteed as to quality. [R. 60, 62, 64, 77, 104.]

In its advertising matter published during 1932, 1933, and 1935 [Pltf's Exs. 3, 4, 5, R. 60, 62, 64] the appellee constantly and conspicuously used the trade-name "Armex" for its products. In Exhibits 3 and 4 [R. 60, 62] there is a heading "Product of the Armature Exchange, Inc.", and the phrase "Guaranteed Quality" is also used.

The appellee, having been informed by the Collector of Internal Revenue that it was liable for excise tax on the sale of its armatures, filed excise tax returns for the period June, 1935, to and including December, 1936, showing an aggregate tax due of $1,052.30 which was paid. [R. 3-4.]

On September 6, 1935, the Commissioner assessed the sum of $1,579.72 against the appellee to cover delinquent tax and interest on the sale of automobile generator armatures which were sold during the period from June, 1932, to May, 1935, inclusive, and the appellee has paid the sum of $400 on that tax, in eight installments of $50 each, from May 28, 1936, to December 30, 1936. [R. 4-5.]

On April 29, 1937, the appellee filed a claim for the refund of $1,452.30. [R. 5.] The claim is predicated on the ground that the appellee was neither the manufacturer nor producer of the armatures, but that its process constituted the repair, rebuilding or rewinding of damaged and burned out automobile generator armatures; also that the burden of the taxes was borne by appellee. [R. 6-7.] On November 18, 1937, the Commissioner of Internal Revenue rejected the appellee's claim. [R. 8.]

Statement of Points to Be Urged.

The points to be urged by the appellant are fully set forth in the record [111-112], and are fully relied upon here. The main point is that the District Court erred in determining that the sales of armatures by the appellee, during the taxable period involved herein, were not sales of automobile parts or accessories by a manufacturer or producer within the purview of Section 606(c) of the Revenue Act of 1932.

Summary of Argument.

The transactions involved constituted sales of automobile parts within the meaning of the statute, which is a revenue measure exclusively, and is to be construed accordingly. The automobile parts were fashioned by combining new materials with salvaged materials and subjecting them to numerous machine and hand operations which clearly constituted manufacturing processes. The completed articles were stocked, cartoned, labeled, cataloged and marketed by appellee under its own trade mark and trade name "Armex" and were sold chiefly to jobbers for resale to garage men and mechanics for use in repairing automobile motors for individual car owners. From the standpoint of production and distribution in the trade, appellee performed the function of a manufacturer and producer of armatures in the true sense and not the repairing of used armatures for owners or users.

The principles of the better reasoned and more recent decisions support the view that appellee is a manufacturer or producer of automobile parts. Likewise, under the applicable Treasury Regulations the appellee is taxable as the manufacturer or producer of the articles it sold.

The judgment, ultimate findings and conclusions of the court below are not supported by the evidence, are erroneous, and should be reversed.

ARGUMENT.

I.

The Transactions Involved Constituted Sales of Automobile Parts Within the Meaning of the Statute, Which Is a Revenue Measure Exclusively, and Is to Be Construed Accordingly.

By Section 606(c) of the Revenue Act of 1932 [Appendix, *infra*], an excise tax equivalent to 2% of the sales price is imposed with respect to automobile parts or accessories upon the manufacturer, producer, or importer thereof. However, no imports are involved here.

Clearly, the "Armex" armatures sold by appellee are automobile parts or accessories. Thus, the inquiry is whether appellee's sales thereof are taxable to it as the manufacturer or producer within the meaning of the Act. The court predicated his decision against the Government upon the view that the mechanical operations of the appellee constituted merely a process of repair and restoration and that, therefore, appellee was not a maufacturer or producer within the provisions of the statute. We submit that the decision is erroneous.

We contend that appellee was engaged in the manufacture, production and sale of armatures and not in the business of repairing used and worn-out armatures; that it had a factory, made armatures and sold them—it did not enter into contracts for the performance of labor and supplying of material with respect to articles owned by others who retained ownership and sought merely to prolong the life thereof by having the articles repaired for their own use; that in connection with the production of its article, appellee purchased used, burned out and worn out armatures which had been discarded and relegated to the junk heap, *i. e.,* it used, in part, scrap having a value

essentially as raw material; that it stripped and dismantled the used and discarded armatures and salvaged and prepared the usable shafts, commutators and laminated cores for its manufacturing and production processes; that by machine and hand operations, lathing, cleaning, polishing, cutting, manipulating, assembling, baking, adding and combining with the prepared salvaged parts new materials and industry, it processed and fashioned such materials into articles of merchandise which it stocked and marketed under its own special trade name "Armex" quality armatures; that all of such articles were the equivalent of armatures processed and fabricated entirely from new materials which had not been previously used in similar manufactured articles. In other words, we contend that all of the essential elements of manufacture exist for the purpose of the taxing statute.

The statute is very broad and comprehensive and indicates a Congressional intent to bring within the reach of its taxing provisions all persons placing automobile parts and accessories on the market for sale in the United States.

An example of the broad scope of the tax, as intended by Congress, is furnished by Section 623 of the Revenue Act of 1932, which provides:

> SEC. 623. SALES BY OTHERS THAN MANUFACTURER, PRODUCER, OR IMPORTER.
>
> In case any person acquires from the manufacturer, producer, or importer of an article, by operation of *law or as a result of any transaction not taxable under this title,* the right to sell such article, the sale of such article by such person shall be taxable under this title as if made by the manufacturer, producer, or importer, and such person shall be liable for the tax. (Italics supplied.)

The applicable Treasury Regulations (Regulations 46) broadly define the terms used in the Act. They provide in part as follows:

> ART. 4. *Who is a manufacturer or producer.*—As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.
>
> Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.
>
> * * * * * * * *
>
> ART. 41. *Definition of parts or accessories*—The term "parts or accessories" for an automobile truck or other automobile chassis or body, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article * * *.

Section 1111(b) of the Revenue Act of 1932 provides that the term "includes" when used in a definition in the Act shall not be deemed to exclude other things otherwise within the meaning of the term defined, and Article 2 of Treasury Regulations 46 provides that the "terms used in these regulations have the meaning assigned to them by section 1111."

Thus, it is obvious that Congress intended to impose the tax upon the sale of each and every automobile part or accessory produced and sold to wholesalers, jobbers and

distributors as well as sales by the manufacturer directly to the retailer or ultimate consumer. However, the decision below, if allowed to stand, would nullify such Congressional intent by permitting the production of automobile parts from a combination of new materials with salvaged parts of worn-out articles having no other value than that of junk and the sale thereof in competition with similar automobile parts produced entirely from new materials, without being subjected to tax upon sale to the wholesale trade.

It should be remembered that the excise tax is a revenue measure exclusively. Thus, the facts must be considered in the light of such statutory object and purpose.

The tax is on each transaction at the rate of 2% of the manufacturer's sale price of the article sold. It is not imposed upon repair jobs involving mere contracts for labor and material on articles owned and used by another. Because of the hundreds of thousands of transactions occurring daily throughout the country, which are subject to the excise tax provisions, the method of ascertainment of such taxes must be possible of accomplishment without being fettered by technical refinements which tend to defeat the purpose of the statute as a means of raising revenue. The following quotation from *Raybestos-Manhattan Co. v. United States,* 296 U. S. 60, 63, is apropos here:

> The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements.

See, also, *Founders General Co. v. Hoey,* 300 U. S. 268, to the same effect.

In *Tyler v. United States,* 281 U. S. 497, the Court stated (p. 503):

> The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions * * *.
>
> Taxation, as it many times has been said, is eminently practical * * *.

In the *Tyler* case, the Court held that the Congressional intent to tax decedent's interest at date of death in a tenancy by the entireties could not be restricted by the technical incidents of such common law tenancy. Likewise, the terms "manufacturer" or "producer", used in the statute, should not be treated as words of art, but rather construed so as to effectuate the evident broad intent of Congress with respect to the taxation of automobile parts. In *Turner v. Quincy Market Cold Storage & Warehouse Co.,* 225 Fed. 41, 43 (C. C. A. 1st), it was held that the term manufacture "is a very broad word, which it is not safe to limit in a general way." See *Hughes & Co. v. City of Lexington,* 211 Ky. 596, 277 S. W. 981, 982, wherein the court, in holding that appellant was engaged in manufacturing, stated:

> That the definition of the term is a question of law and for the courts is plain, but the courts are practically agreed that it is incapable of exact definition, and that there is no hard and fast rule which can be applied, but that *each case must turn upon its own facts, having regard for the sense in which the term is used and the purpose to be accomplished.* [Citing cases.] (Italics supplied.)

In *Carbon Steel Co. v. Lewellyn,* 251 U. S. 501, it was held that the rule of strict construction will not be pressed so far as to reduce the taxing statute to a practical nullity by permitting easy evasion. The Court stated (p. 505):

> It is, of course, the contention of petitioner that this was furnishing, not *manufacturing,* and that the literal meaning of words can be insisted on in resistence to a taxing statute. We recognize the rule of construction but it cannot be carried to reduce the statute to empty declarations. And, as we have already said, petitioner's contention would so reduce it.

It may be added that the proper guide for the interpretation and construction of Section 606(c)—as for all internal revenue laws—was furnished by the Supreme Court in *Stone v. White,* 301 U. S. 532, 537:

> It is in the public interest that no one should be permitted to avoid his just share of the tax burden except by positive command of law, which is lacking here.

It follows from what has been said that the first question for determination in a case of this kind is whether there has been a *sale* of the articles under consideration, for if there has been no sale the statute does not apply. If the articles have been sold, the only remaining inquiry is whether the seller was also the manufacturer, producer, or importer thereof, within the meaning of the applicable statute and regulations. In passing upon the latter question, it should be borne in mind that the idea of one repairing an article for another is opposed to the idea that the repairer may be simultaneously the seller of the article itself upon completion of his contract for the performance of labor and supplying of materials. Yet, conversely, the taxpayer contends in substance, in its claim for refund, that although it was the seller of the articles in question, it should be held to be only the repairer thereof. There is no question but that the armatures were sold by appellee for use by ultimate vendees in repairing automobile engines.

II.

Appellee Is the Manufacturer or Producer of the Armex Automobile Generator Armature Sold by It and Not Merely a Repairer of Used, Damaged and Worn Out Armatures.

Appellee was incorporated "to carry on the business of manufacturing and assembling armatures * * *" and to market them. [R. 106.] It operated a plant, had considerable machinery and equipment, employed on an average 14 or 15 men, produced at least 80 armatures per day and maintained a stock for sale of 600 different types of armatures, each with appellee's own stock number.

The taxing statute does not discriminate between automobile parts produced entirely from new materials and those produced by combining new materials with usable materials salvaged from scrap or junk which has been purchased and dismantled for such purpose. Neither do the definitions of the words manufacturer, producer, manufacture, or produce, require that a manufactured article shall consist entirely of new or virgin raw materials. In fact, it has been held that a manufactured article need not be made wholly or even in part of raw material. *The King v. Biltrite Tire Co.,* 1937 Canada Law Rep. (Ex. C. R.) 1, 14.

Appellee considered itself the manufacturer or producer of the armatures it stocked and sold. Otherwise, it is not likely that it would have adopted the distinctive trade mark and trade name under which it advertised its product in its catalogs as one made and produced by it. It did not represent itself as a mere "repairer". In other words, it held itself out as the producer of the taxable articles which it processed and placed in marketable form. Cf. *Red Star Yeast & Products Co. v. LaBudde,* 83 F. (2d) 394, 396 (C. C. A. 7th).

Even in the absence of its representations, the evidence clearly shows that appellee was the manufacturer and producer of the armatures which it sold because the essential elements of manufacture were shown to exist. It made a serviceable and salable product from scrap and raw materials. It acquired, at a small price, worn-out armatures from which it salvaged the usable parts and then by machine and hand operations, together with the addition of new materials, it assembled and fashioned an automobile part which it marketed under its own trade name in competition with similar products manufactured by others. Whether the appellee itself manufactured the commutator, shaft and laminations used in producing "Armex" armatures would appear immaterial. The essential fact is that the appellee combined the salvaged individually useless items with new materials and, through the employment of skill, labor and machinery, produced a valuable item of commerce.

There can be no dispute but that when appellee acquired the worn-out armatures they were classifiable as scrap and junk. The following definitions and authorities concerning scrap and junk seem clearly applicable:

56 Corpus Juris 884-885, states:

> *Scrap.* (Sec. 1) A. *As Noun.* The word originally meant what was scraped off. It has come to have an extended meaning and includes anything that is thrown aside. The word has reference to the antecedent history of the article and not to the use that a new owner might make of it.
>
> * * * * * * * *
>
> (Sec. 2) B. *As Adjective.* On the form of scraps; also valuable only as raw material.

In *Ward, Ltd. v. Midland R. Co.,* 33 T. L. R. 4, 6 (Eng.), "scrap" was defined as follows:

> An article was scrap if it was no longer useful to its owner; the word had reference to the antecedent history of the article and not to the use that a new owner might make of it.

The word "junk" has been held to include discarded parts of machinery. *City of Duluth v. Bloom,* 55 Minn. 97, 100, 21 L. R. A. 689, 690. Discarded automobile fixtures were held to be within the definition of "junk" in *Melnick v. City of Atlanta,* 147 Ga. 525, 94 S. E. 1015. In *City of Chicago v. Reinschreiber,* 121 Ill. App. 114, 120, the court defined the word "junk" as (pp. 118-119)—

> worn out or discarded material in general, that still may be turned to some use, especially old rope, chain, iron, copper, parts of machinery, bottles, etc., gathered or bought up by persons called "junk dealers" * * *.

In the instant case the used armatures were nothing more than "junk" when received by appellee. The principal purpose of its business was to produce and sell armatures for numerous makes of automobiles from raw and essentially raw material which it prepared. The acquisition of second-hand material was merely incidental to its manufacturing business.

In *City of Louisville v. Zinmeister & Sons,* 188 Ky. 570, 222 S. W. 958, the court stated (pp. 575-576):

> Courts have experienced much difficulty in determining what is a manufacturing establishment and what is included in the term "manufacture." There is no hard and fast rule by which to determine whether a given establishment is a "manufactory," but *all the*

> *facts and circumstances must be taken into consideration* in determining whether the establishment is or is not to be so reckoned. *Whether it is such an establishment does not depend upon the size of the plant, the number of men employed, the nature of the business or the article to be manufactured, but upon all these together and upon the result accomplished.*
>
> If raw material is converted at a factory or plant into a finished product, complete and ready for the final use for which it is intended, or so completed as that in the ordinary course of business of the concern it is ready to be put upon the open market for sale to any person wishing to buy it, the plant which turns it out is a manufacturing establishment within the meaning of the statutes * * *. (Italics supplied.)

Likewise in the instant case it is important to consider all the surrounding facts and circumstances and not limit consideration of the question involved to any single factor, or to the narrow confines of an antiquated literal interpretation of the word "manufacture" as understood prior to the advent of modern machinery and industrial methods of salvaging for manufacturing purposes.

If the terms "manufacturer" and "producer" are to be whittled away by fine distinctions, the intent and purpose of Congress to impose a tax upon automobile parts produced and sold to jobbers and wholesalers will necessarily be defeated. *In re First Nat. Bank,* 152 Fed. 64, 67 (C. C. A. 8th).

It cannot be disputed that the used armatures, or scrap, had lost their commercial value as armatures. When purchased and acquired by appellee they were valuable to it merely for the purpose of obtaining the usable shafts,

commutators and metal laminations for use by it as partially prepared raw materials to which, after preparation thereof for its operations, it added other raw materials, skill and industry before there was completed and created the marketable product which it placed in stock for sale to its jobber trade. Such salvaged prepared materials, consisting of usable shafts, commutators and metal laminations, were not armatures while in that form but, as stated, constituted partially prepared materials on which appellee thereafter performed hand and machine operations, added other materials, assembled the same and employed skill before the salable article was completed for marketing. The position of appellee is the same as if it had purchased shafts, commutators and metal laminations salvaged (from discarded and worn-out armatures) and prepared by the vendor for combination with the new materials in connection with assembling and finishing operations. If then appellee had purchased from a third party the remaining necessary materials, consisting of black enameled cotton insulated cooper wire, solder, flux, varnish, end fibers, slot insulations, slot wooden wedges, crepe, armature twine or cord, etc., and continued with all subsequent steps, it could hardly be suggested that the article in its final condition had not been produced or manufactured by appellee. The mere fact that appellee has itself performed the defined operations on the salvaged parts of the used armatures cannot exclude it from operation of the taxing statute.

The court below was of the opinion that the old or worn-out armature did not lose its identity *qua* armature and that, therefore, the appellee could not be said to have manufactured or produced an armature. However, when one bears in mind the various steps taken by appellee, and particularly the state of the article when reduced to the

three salvaged usable parts (shaft, commutator and steel laminations), it would appear that appellee cannot be any less the manufacturer of an armature because it started with something that had once been a usable armature than if, as suggested above, it had commenced with several substances purchased from different sources.

We think that all of taxpayer's contentions have been thoroughly discussed and answered by seven able Canadian judges in the re-treaded tire decisions of *Biltrite Tire Co. v. The King,* 1937 Canada Law Rep. 364; *The King v. Biltrite Tire Co.,* 1937 Canada Law Rep. 1, and *The King v. Boultbee Ltd.* [1938], 3 Dominion Law Rep. 664.

The foregoing Canadian decisions carry the full burden of our argument and effectively refute any contentions of appellee.

With the exception of the instant case and one other (*Con-Rod Exchange, Inc. v. Henricksen,* 28 F. Supp. 924 (W. D., Wash.)), virtually all the recent cases involving facts and questions similar to those presented here have been decided in favor of the Government, including the only case which has gone to an appellate court, *viz., Clawson & Bals v. Harrison,* 108 F. (2d) 991 (C. C. A. 7th) involving "rebabbitted" connecting rods; *E. Edelman & Co. v. Harrison* (N. D., Ill.), decided April 7, 1939, not officially reported but published in 1939 Prentice-Hall, Vol. 1, par. 5,379 (armatures); *Federal-Mogul Corporation v. Smith* (S. D., Ind.), decided February 23, 1940, not yet reported but published in 1940 Prentice Hall, Vol. 4, par. 62,510 (connecting rods); *Moore Bros., Inc. v. United States* (N. D., Tex.), decided May 14, 1940, not officially reported but published in 1940 Prentice-Hall, Vol. 4, par. 62,676 (armatures).

It is true that there have been a number of District Court decisions against the Government involving so-called "rebuilt" armatures and generators, "rebabbitted" connecting rods and "re-treaded" tires. *Monteith Bros. Co. v. United States* (N. D., Ind.), decided October, 1936, not officially reported but published in 1936 Prentice-Hall, Vol. 1, par. 1710 (involving armatures and connecting rods); *Hempy-Cooper Mfg. Co. v. United States* (W. D., Mo.), decided May 6, 1937, not officially reported but published in 1937 Prentice-Hall, Vol. 1, par. 1461 (connecting rods); *Bardet v. United States* (N. D., Cal.), decided May 18, 1938, not officially reported but published in 1938 Prentice-Hall, Vol. 1, par. 5,507 (connecting rods); *Becker-Florence Co. v. United States* (W. D., Mo.), decided December 27, 1938, not officially reported but published in 1939 Prentice-Hall, Vol. 1, par. 5,161 (armatures); *Con-Rod Exchange, Inc. v. Henricksen,* 28 F. Supp. 924 (W. D., Wash.) (connecting rods), and *Skinner v. United States,* 8 F. Supp. 999 (S. D., Ohio), (tires). However, these cases did not present satisfactory records for appeal.

We submit that the principles laid down in the *Clawson & Bals* case, *supra,* are squarely in point here. The Circuit Court of Appeals in that case stated as follows (pp. 992-993):

> In the course of announcing its decision the District Court made the following statement:
>
> "The court is of the opinion that what the plaintiff did and what it is doing is the manufacturing and producing of connecting rods from scrap. It is true that the scrap may have slightly greater value than some other kinds of scrap, but it is still scrap, and when it is manufactured or produced by the plaintiff

it has a relatively much greater value than in its scrap condition.

"The situation here seems to be much like the situation in the worn-out tire case. Those worn-out tires look like tires. These worn-out connecting rods undoubtedly look like connecting rods, and one can recognize that they have been connecting rods, just as one can by looking at a worn-out tire recognize the fact that it has been a tire. But in each case, the articles are worn out. A manufacturing process is, in the opinion of the court, required to make a serviceable product; and in the case of the connecting rod, the plaintiff carries on that manufacturing process."

We believe that the foregoing aptly sums up the merits of the case.

As we also strongly rely on the Canadian decisions, *supra,* the following is again quoted from the *Clawson & Bals* decision (pp. 993-994):

Defendant-appellee cites and relies strongly upon a decision of the Supreme Court of Canada in *Biltrite Tire Co. v. The King.*[2] The analysis of the facts and the reasoning of the court as revealed in the opinion are strongly persuasive that on the facts of the instant case the taxpayer is a manufacturer or producer of connecting rods. The legislative enactment imposed an excise duty on "tires in whole or in part of rubber" which were "manufactured or produced in Canada and sold." The business practice of the Canadian taxpayer was to purchase in bulk lots old and worn-out motor vehicle tires and put them through a process of repair, treatment and retreading, for sale

[2]1937 Canada Law Rep. 364.

in the trade. Throughout the process the sidewall of the tire was not dismantled or destroyed, the numerical identification of the original tire was not destroyed, and the name of the manufacturer of the original tire was clearly marked upon its sidewalls, upon which the taxpayer also marked a serial number. In the course of treatment of the old tire the tread was removed and a new tread affixed; holes were patched, cement and plastic rubber preparation utilized. The final result of the treatment was that repairs to holes and blow-outs, the cementing inside and without, and the new tread, were firmly and permanently affixed to the fabric and side-walls of the original tire. The Canadian court sums up the whole process as follows:

"What the appellant did was to remove part of the old or worn-out tire and add to the remnant the plastic rubber preparation. It would appear that the position is the same as if the appellant had purchased an old or worn-out tire which had already been treated by the vendor in the manner described above, down to and including the cutting off of the old tread. If then the appellant had purchased from a third party the rubber preparation and had applied the latter and continued with the subsequent steps, could it be suggested that the article in its final condition had not been produced or manufactured by the appellant. The definitions of words 'manufacture' and 'produce' as nouns or verbs, in the standard dictionaries, clearly indicate that such proceedings would constitute the appellant a manufacturer or producer. And the mere fact that the appellant has itself performed the defined operations on the old tire cannot exclude it from the operation of the section.

"* * * It is suggested that the old or worn-out tire did not lose its identity *qua* tire and that, there-

> fore, the appellant could not be said to have manufactured or produced a tire. However, when one bears in mind the various steps taken by appellant and particularly the state of the article when the tread was removed, it would appear that appellant cannot be any less the manufacturer of a tire because it started with something that had once been a usable tire than if, as suggested in the preceding paragraph, it had commenced with two substances purchased from different sources."

The cases chiefly relied upon by the court below in its opinion are *Hartranft v. Wiegmann,* 121 U. S. 604; *Anheuser-Busch Assn. v. United States,* 207 U. S. 556; *Fruit Growers, Inc. v. Borgdex,* 283 U. S. 1, and the several District Court cases referred to above involving automobile parts. As stated, the conclusions reached in the several District Court cases are inapplicable under the evidence in this case, are erroneous and conflict with the principles announced in *Clawson & Bals, supra.* Neither do the Supreme Court decisions relied upon by the court below in its opinion support its judgment or require a conclusion contrary to that contended for by appellant. They arose under provisions of the tariff and patent laws and the Supreme Court's reasoning was addressed to fact situations entirely unrelated to that presented here. A proper appraisal of the excerpts thereof from the opinion below can be made only by considering the entirely different fact situations to which the Supreme Court's statements and reasoning were directed.

Thus, in *Hartranft v. Wiegmann, supra,* the question was whether the cleaning and, in some instances, etching and polishing of crude sea shells by London merchants for sale as shells for purpose of ornament, caused the shells,

upon importation into the United States, to fall within the duty free class of "shells of every description, not manufactured," or within the dutiable provision of "Shells, manufacturers of:". The Supreme Court held they were to be admitted free because they were still shells, and were not manufactured within the sense of the tariff statute. The shells were products of nature which were merely beautified for purpose of sale as ornamental shells. There was no salvaging of worn-out, unserviceable materials or parts which had been discarded as no longer useful for the purpose to which originally put and adapted. Substantially the same situation existed in *Anheuser-Busch Brewing Assn. v. United States, supra.* The Association imported corks already manufactured and merely gave the manufactured articles special treatment for its own special purposes, that is, for use in the encasement of its beer. Similarly, in *Fruit Growers, Inc. v. Borgdex, supra,* the Supreme Court held that the immersion of oranges in a solution to prevent decay while on the road to market was not a manufacturing process and did not result in a manufactured article. The orange was an edible fruit both before and after the process.

In *Cadwalader v. Jessup & Moore,* 149 U. S. 350, the recovery of customs duties was sought on the ground that old india-rubber shoes imported by Jessup & Moore were valuable only as a substitute for crude rubber and, therefore, were exempt from duty under the free classification "India-rubber, crude and milk of." A duty of twenty-five per cent *ad valorem* had been collected on the old shoes as (p. 351) "articles composed of india-rubber, not specially

enumerated or provided for in this act." Another section of the act provided for a duty on non-enumerated articles equal to that imposed upon the enumerated articles they most nearly resembled, and where they resembled two or more enumerated articles, that taking the highest duty was to be used as the basis. The Supreme Court, in holding the articles to be non-dutiable, held that the old shoes had lost their commercial value as such articles, and substantially were merely the material called "crude rubber". Thus, the principle of the *Cadwalader* case supports the contention that appellee was a manufacturer and producer since here, because of the loss of their commercial value, the armatures were essentially raw material.

In passing, attention is directed to the fact that the principles of the *Clawson & Bals* case, *supra,* have been adopted and are being followed by the Treasury Department, as shown by Sales Tax Ruling 896, 1940-8 Int. Rev. Bull. 19.

In conclusion, therefore, it may be said that when looked at from the standpoint of production and distribution in the trade the appellee is and was performing the function of a manufacturer and producer rather than a repairer. Appellee produced armatures for the trade in the very true sense and did not repair, rebuild, restore or rewind old or used armatures for owners or users. The fact that appellee could perhaps perform for the owner of used and worn-out armatures all of the mechanical operations which it may have performed for itself, and still properly be classified as a repairer or rebuilder, does not

require a holding that the appellee is a repairer or rewinder when it purchases discarded armatures to be used as materials for combination with other materials of the appellee, and by mechanical operations prepares what are, for all practical purposes, new armatures for sale in the trade.

We submit that the decisions of the seven Canadian judges and of the Seventh Circuit Court of Appeals afford a correct basis for the interpretation of the provisions of the taxing statute and applicable regulations, and any other conclusion is erroneous.

Conclusion.

It is submitted that the evidence does not support the alternate findings, conclusions and judgment below, and it should be reversed.

Respectfully submitted,

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June, 1940.

APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 606. TAX ON AUTOMOBILES, ETC.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

* * * * * * * *

(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsection (a) or (b), 2 per centum. * * *

[Note: Subsections (a) and (b) refer to autobiles, automobile trucks and motorcycles.]

Treasury Regulations 46, approved June 18, 1932:

ART. 4. *Who is a manufacturer or producer.*— As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knockdown condition, but complete as to all component parts, shall be liable for the tax under Title IV and not the person who buys and assembles a taxable article from such component parts.

ART. 41. *Definition of parts or accessories.*—The term "parts or accessories" for an automobile truck or other automobile chassis or body, or motorcycle, includes (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or (c) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

The term "parts and accessories" shall be understood to embrace all such parts and accessories as have reached such a stage of manufacture that they constitute articles commonly or commercially known as parts and accessories regardless of the fact that fitting operations may be required in connection with installation. The term shall not be understood to embrace raw materials used in the manufacture of such articles.

Spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, automobile truck or other automobile chassis or motorcycles, are considered parts or accessories for such articles whether or not primarily designed or adopted for such use.

No. 9469.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ARMATURE EXCHANGE, INCORPORATED, a corporation, also known as THE ARMATURE EXCHANGE, a corporation, also known as THE ARMATURE EXCHANGE, INCORPORATED, a corporation,

Appellee.

BRIEF FOR THE APPELLEE.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

MISCELLANEOUS.

STATUTES.

INDEX TO APPENDIX.

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Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

The opinion of the District Court [R. 11] is reported in 28 Fed. Supp. 10.

Jurisdiction.

This is an appeal from a judgment of the District Court entered September 13, 1939 [R. 41], in the amount of $1,452.30, without interest, assessed and paid as manufacturer's excise taxes. Notice of appeal was filed December 12, 1939. [R. 42-43.] The jurisdiction of this Court is invoked under Section 128 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether sales of rewound automobile generator armatures by appellee were taxable under Section 606(c) of the Revenue Act of 1932, imposing tax upon automobile parts, "sold by the manufacturer, producer, or importer" thereof.

Statutes, Regulations and Rulings.

The applicable statute and regulations involved will be found in the appendix to this brief.

Statement.

The case was tried by the Court without a jury, and the evidence consisted of the testimony of three witnesses for appellee, together with numerous exhibits and documentary evidence adduced by each of the parties. After oral argument the Court rendered an oral opinion [R. 11-26], and subsequently filed findings of fact and conclusions of law in favor of appellee. [R. 28-40.] The mechanical facts, as disclosed by the undisputed evidence, were summarized by Judge Yankwich in his opinion as follows [R. 12-17]:

> "The plaintiff takes old armatures on which the winding has been worn off and rewinds them.
>
> "The process used is this: The armatures are placed in a lathe and the wires leading from the core to the commutator are cut out with a knife as the lathe revolves. The cores are then heated over a gas flame for about twenty minutes (the flames coming up from a range within the metal box), the purpose of

which being to loosen the old wires and old insulation, so that they may be easily removed. After the armatures are laid out on a metal top table and slightly cooled, they are placed in a V-shaped slot, and a steel chisel is driven down between the mass of old wires which have been loosened by heating, and the old wires are pried out. The armatures are then placed in a machine equipped with a small saw which reslots each commutator bar at the place where old wires were soldered in (i. e. at the end of the commutator closest to the core). This machine operates by suspending the shaft on which the core and commutator are mounted between a clamp, and the sawblade about one and one-half inches in diameter is moved up to each slot by means of a lever, and the shaft is rotated by hand. Any solder remaining in the slots is removed with a small metal pick. The placement of the commutator on the shaft is checked with a pair of calipers by measuring from the point on the shaft where the bearing rides to the [11] front end of the commutators. The distance from the core to the commutator is measured with a metal rule. Any errors in the mounting of the core or commutator on the shaft are corrected by means of adjusting their respective placements by means of an arbor press. The laminations of almost every core are pressured together on this same press before any further steps are taken, in order to realign any laminations which may have become somewhat separated. To insure that none of the bars on the commutator are grounded to the shaft, or shorted, a test is given by rotating the end of a live wire over the commutator, and at

the same time having the shaft grounded. Then each portion of the shaft leading from each side of the core is insulated by approximately five wrappings of paper around the shaft as it protrudes from each end of the core. The insulation is about an inch or so in length. Each slot in the core is also insulated by placing it in a folded insulated paper approximately the size of a cigarette paper; and each surface end of the core is insulated with a heavy pressed cardboard which has been stamp-cut the shape of the surface ending of the core. Approximately 95 per cent of the armatures are rewound on a Chapman winder, designed to rewind armatures with fourteen-slot cores. Those which have a different number of slots must be rewound by hand. This machine has a lathe, in which two jaws hold the laminated core in such a manner that the shaft extends perpendicularly from the axis of the lathe an equal distance in each direction. Two strands of wire lead from two different reels up through the top of the machine, over pulleys and down to the armature in the jaws of the lathe. Two sizes of wire are used in the winding, depending upon the electrical output expected out of the generator; i. e., heavier wire can give a greater output. Each coil is wound with six complete turns. [12] On each turn, the wire in the slot on one side of the core leads into each slot, making, therefore, in the case of a fourteen-slot core, twenty-eight coils. Upon the completion of each coil,—that is, after six turns,—the wire is laid up over the commutator end of the shaft, and, at the conclusion of the next coil following, that particular wire is cut near the com-

mutator-end of the shaft and the lead end of the wire folded back. However, the lead ends on the top coils of the half of the core that is lastly wound are not cut by the winder operator, because there is no necessity of cutting them, but are left suspended in a loop over the commutator end of the shaft. The only reason for cutting the other wires is because they are from coils that are underneath and, if they were not cut, the wire from the top coil would bind them down to the shaft. The armature is then placed in a lathe-like clamp, called a bench center, which clamp suspends the armature by holding it at each end of the shaft. Then all of the wires which were not previously cut by the operator on the winding machine are cut. This leaves fifty-six leads, with two ends to each coil, and two coils to each slot. To hold the wires in the slots, wooden wedges are then driven over the top of the wires and into each slot of the laminated core. The leads are pulled down in three equal groups and the ends of the leads inserted into an electrically driven machine with two wire rollers operating in opposite directions, which cleans all of the insulation from the leads for a distance of about two inches from the ends of the leads. These leads extend approximately four inches out of the slots of the core. The leads from the top coils are folded back over the core, and then the leads from the bottom coils are similarly folded back, so as to make them easily available to the operator when he is [13] connecting them with the commutator. There are four sets of leads, corresponding with the sets of

coils in the armature. Those leads are inserted firmly in place by means of a small chisel. As the leads are connected, the operator rotates the armatures. A connection of a set of leads is completed with each rotation. As each complete rotation is made, the wires which now lead from the core to the commutator are insulated by wrapping with insulating paper approximately one and one-half inches in width. Since there are four complete sets of leads, this makes three sets of insulation, the top leads being exposed. Twine is then wrapped around just behind the commutator with about seven turns, so that should the soldering holding the leads into the commutator become hot, the cord will still keep the leads in place. Solder flux is painted around the commutator where the wires have been tapped into the slots. The whole commutator is then immersed into solder, the solder only adhering to the band where the flux has been applied. The armatures are then placed on end into a tray and the tray is lowered into an insulating varnish, where it remains for about fifteen or twenty minutes, so that the cotton insulation of the wire will be completely saturated. The tray is then raised, and the armatures drained for approximately thirty minutes. The armatures are placed in an electric oven, and baked overnight at a temperature of about two hundred and fifty degrees. The total day's production is generally dipped and baked at one time. The armature is taken from the oven and placed in a lathe where the commutator is planed down sufficiently to true the brush surface of the commutator.

The end of the shaft of the armature is placed into a chuck and is rotated, and, by applying an abrasive cloth to the sur- [14] face of the laminated core, the shaft and the commutator, they are polished and all the excess varnish is removed from the metal. The armature is then placed between centers and a small saw blade, approximately one-quarter of an inch in diameter, cuts the level of the mica insulation between the commutator bars to a level below that of the surface of the bars of the commutator. The armature is tested for shorts, by placing it onto a magnetic growler (that is, by setting the core part on the magnet) and if there is a short in the armature, a thin metal blade will be attracted to the core. The armature is tested to see if it is grounded by touching one wire to the shaft and the other to the commutator, and if it is grounded, the connection is made and a light attachment is illuminated. The shafts are then checked for undersize with a micrometer. If the shaft is too far undersize, it has to be knurled or sleeved. The shaft is roughened so that it will fit snugly with a bearing. If the shaft is too small to be knurled, it must be turned down on a lathe and a metal sleeve driven over it. About fifty per cent of the shafts must be knurled, and about fifteen per cent must be sleeved. The armatures are then finally checked by rotating the commutators under a micrometer, to insure that every bar of the commutator is of approximately the same height, otherwise proper contact with the generator brushes will not be made. The ends of the shafts are then rethreaded and the armatures are ready for boxing."

ARGUMENT.

I.

The Rewinding of Used, Secondhand Armatures Is Not the Manufacture or Production of Armatures, But Is Only the Repair, Restoration or Reconditioning Thereof.

(a) Manufacturing or Production Consists of the Application of Labor or Skill by Hand or Machinery So That as a Result Thereof a New, Different and Useful Article of Commerce Is Produced.

In this case plaintiff seeks a refund of manufacturer's excise taxes paid by it upon the sale of used, secondhand automobile generator armatures which plaintiff had rewound and repaired. All of said armatures were secondhand armatures when acquired by plaintiff. That is to say, all of the armatures which plaintiff rewound had been manufactured by some one at some prior time and had actually been used as operating parts of automobile motors. By reason of such use, the wire coils on the armatures had become damaged or burned out.

On direct examination, Harry E. Seneker, a witness for the plaintiff, explained the usual causes of armatures burning out [R. 102-103]:

> "Q. What is the usual cause of armatures burning out?
>
> A. Well, the usual cause is the armature brushes—I mean the generator brushes become worn and too short, so that they don't touch the commutator, especially in the take-off brush. It becomes too short, and it is the same as a generator running

on an open circuit. Therefore, it creates excessive heat and burns itself out.

"Another reason is that a generator will be set up at too high a rate, too excessive a charge, and creates so much heat that it burns itself out.

Q. Any other causes?

A. Well, failure to upkeep the generator. For instance, the commutator will wear itself down so that the brushes begin touching the mica between the bars; the brushes fail to make contact, and the same result, the armature will create excessive heat and burn itself out.

"Also, if a man fails to keep his generator oiled, the bushings may wear so that the armature will slightly touch the pole shoes and create friction and burn itself out. That is about all that I know of, right at present; the most important ones."

The plaintiff in this case repaired armatures damaged as above related. The method of repairing is set forth in the record (Joint Exhibit No. 1). From the series of 21 pictures and the explanatory statement of each contained in said exhibit, it can readily be seen that there is no loss of identity or dismantling of the component parts of the armatures. In fact, uncontradicted testimony of the plaintiff's witness, Alfred Prescott Daniels, was as follows [R. 75-76]:

"The only part that was removed was the winding or the wire from the armature."

"No, there was no identification removed."

Therefore, if the plaintiff's rewinding process commenced with an armature and ended with an armature, it is obvious that nothing has been manufactured or pro-

duced. No new article of commerce has been produced by the process; no new thing has been brought into existence. When the rewinder commenced his work he had an armature (Joint Exhibit No. 1, page 1). When his work was completed he still had an armature (Joint Exhibit No. 1, page 21). It makes no difference how long it took him to do the work, or how many different pieces of machinery he employed during the process, or whether he worked alone in a small shop, or whether he worked with many other workmen in a large plant, or whether, after the process was completed, he immediately reinstalled the armature in the automobile from which it was taken, or whether he laid it upon a shelf and subsequently exchanged it for another used, second-hand armature. The question is, "What did the rewinder do?" Did he produce or manufacture a new article? Did he merely repair an article which someone had previously produced or manufactured? Manifestly, he has repaired an armature. His work commenced after the manufacture or production of that armature had long since been completed and the armature had actually seen service as an operating part of an automobile engine.

The principle which lies at the bottom of the foregoing proposition was recognized and stated by the court in *Thurman, Collector, v. Swisshelm, et al.* (C. C. A. 7) 36 Fed. (2nd) 350. In that case the taxpayer dealt in automobiles. They bought completed Ford automobiles from the Ford Company or its agents. They bought from the Ames Company automobile bodies so constructed that

they would fit the Ford chassis. They would remove the Ford bodies from the automobiles and replace them with the Ames bodies. The question was whether the taxpayers by that process became the manufacturers or producers of automobiles so as to become liable for the manufacturer's excise tax on the automobiles. The court held that the mere exchange of one body for another upon a completed automobile, originally manufactured by someone other than the taxpayers, did not constitute manufacturing or production. And in holding, the court distinguished the case of *Klepper v. Carter* (C. C. A. 9) 286 Fed. 370, in which the tax had been sustained as to a taxpayer who bought a truck chassis from one company and a body from another company, and then assembled the parts "for the first time into a complete truck," and said l. c. 351:

> "The facts are different in that there no truck figured in the transaction until the parts had been assembled and connected; while here appellees bought the completed automobile, upon which the tax had already been paid."

The principle underlying the *Swisshelm* case is in nowise different than in the case at bar. Swisshelm commenced his process with an automobile, completely manufactured and tax paid by the manufacturer; the plaintiff in this case commenced its work with an armature previously manufactured and tax paid by a manufacturer. When Swisshelm finished his process, he still had an automobile—he had created nothing new; when plaintiff in this case completed its rewinding process, it still had an armature—it had created nothing new.

On the question of the taxability of rebabbitted connecting rods the Bureau of Internal Revenue itself recognizes that the rebabbitting process is one of repair and not of manufacture. In S. T. 573, Internal Revenue Bulletin, Cumulative Bulletin XI-2, page 473, the bureau ruled as follows [App. p. 43]:

> "The tax also attaches to rebabbitted connecting rods and reclaimed brake drums in which new steel bands have been inlaid where they are placed in stock to be sold as parts and accessories. However, *where these articles are reconditioned in connection with an immediate repair job the tax does not attach.*" (Italics supplied.)

This ruling in express language recognizes that the process involved is one of *reconditioning and repairing.* The Act (Section 606(c)) does not make reconditioned or repaired parts taxable simply because they are carried in a service stock.

Under the foregoing ruling it is held that if a garage man removes an armature from an automobile motor which he is repairing and immediately rewinds the armature and replaces it in the motor, he has done nothing more than a repair job; he has not manufactured the armature. On the other hand, the bureau would hold that if he exchanges the armature he has just removed from his customer's automobile for an armature taken from some other customer's automobile and rewound the day before, he has manufactured the armature. Yet there is no difference in the rewinding process in the two cases. The only difference is in the service which he is able to render his customer. In the first instance, the customer must wait for his automobile until the rewinding can be done; in the second case, the customer is put to no such inconvenience.

The actual process of rewinding, however, is the same in both cases as that which takes place in the plaintiff's shop.

Jobbers, garage men and even the owners of fleets of automotive equipment sometimes maintain their own rewinding service and rewind their own armatures and those of their customers. No reason is suggested, and it is submitted no reason exists, why rewinding an armature in such a case and under such circumstances is mere repair or reconditioning, whereas manufacture is said to occur when, as in plaintiff's case, an armature is rewound in the same way but is not immediately replaced in the motor from which it was removed, but is held on the shelf for a time and subsequently exchanged with a customer whose armature is burned out and who does not desire to wait while his own armature is rewound.

The Bureau of Internal Revenue in its regulations and in various published rulings has recognized and adopted the usual and commonly accepted definition of the words "manufacture" and "produce." It has recognized that manufacture occurs only when the materials which enter into the process lose their identity as such and emerge from the process as a new article. In other words, it is recognized that when a thing is manufactured, it exists for the first time at the conclusion of the manufacturing process. Thus in Article 4 of Regulations 46 of the Treasury Department relating to excise taxes on sales as imposed by the Internal Revenue Act of 1932, it is provided [App. p. 46]:

> "As used in the act, the term 'producer' includes a person who produces a taxable article by processing, manipulating or changing the form of an article, or producing a taxable article by combining or assembling two or more articles."

Likewise in S. T. 648, Internal Revenue Bulletin, Cumulative Bulletin XII-1, page 384, the bureau in ruling upon the taxability of retreaded automobile tires said [App. p. 44]:

> "The test of taxability where old material or material partly old and partly new is used in producing a tire suitable for use is whether the work done constitutes the manufacture of a tire or is merely a repair job. If the former, the tax is legally due. If the latter, no tax is involved. It is held that where the identity of the old tire is lost in the process, the manufacture of a taxable tire results.
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> * * * * * * * *
>
> "The retreading of old tires by resurfacing or replacement of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article."

Again in S. T. 606, Internal Revenue Bulletin, Cumulative Bulletin XI-2, page 476, the bureau in ruling upon the taxability or rebuilt and reconditioned taximeters said [App. p. 43]:

> "No tax is due upon the sale of rebuilt or second-hand taximeters under Section 606(c) of the Revenue Act of 1932, provided they are not rebuilt or refinished to the extent that they lose their original identity."

The courts have been frequently called upon to define, and apply the definition of, manufacture. A leading and often cited case is *Hartranft v. Wiegmann,* 121 U. S. 609. The issue in that case concerned the rate of duty to be levied upon certain shells depending upon whether

they were or were not "manufactured." The question involved and the facts are stated in the opinion by Mr. Justice Blatchford, as follows, l. c. 613-14:

> "The question is whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being afterwards etched by acids, so as to produce inscriptions upon them. It appears that these shells in question were to be sold for ornaments, but that shells of these descriptions have also a use to be made into buttons and handles of penknives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that the shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufacturers of shells, within the meaning of the statute."

The conclusion of the court and the reasoning supporting it are set forth in the following excerpt from the opinion, l. c. 615:

> "We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufacturers, but were shells not manufactured, and fell under that designation in the free list. They are still shells. *They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell.* The application of labor to an article, either by hand or by mechanism, does not make the article necessarily

a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In 'Schedule M' of Section 2504 of the Revised Statutes, page 475, 2nd Edition, a duty of 30 per cent *ad valorem* is imposed on 'coral, cut or manufactured'; and, in Section 2505, page 484, 'coral, marine, unmanufactured,' is exempt from duty. These provisions clearly imply that, but for the special provisions imposing a duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it. In *Frazee v. Moffit,* 20 Blatchf. 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, although labor had been bestowed in cutting and drying the grass and baling the hay. In *Lawrence v. Allen,* 48 U. S. 7 How. 785, it was held that india rubber shoes, made in Brazil, by simply allowing the sap of the india rubber tree to harden upon a mold, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into a new form, capable of use and design to be used in such new form. In *United States v. Potts,* 9 U. S. 5 Cranch 284, round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of *United States v. Wilson,* 1 Hunt's Merchants' Magazine 167, Judge Betts held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured.

> "We are of the opinion that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on citizens upon vague or doubtful interpretations.' *Powers v. Barney*, 5 Blatchf. 202; *U. S. v. Isham*, 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sumn. 384."

In *Anheuser-Busch Brewing Association v. U. S.*, 207 U. S. 556, the plaintiff sued to recover certain import duties which it had paid on corks designed for use in bottling beer. Under the act there involved plaintiff was required to prove as the basis of its refund or "drawback" that the corks involved were not manufactured corks, but merely materials imported to be used in the manufacture of corks in the United States. The evidence showed that the corks when imported into this country from Spain had already been cut by hand to the required size. It was further shown that in such condition, however, they were not suitable for use in bottling beer because they would not retain the gas in the bottle and because they would impart a cork taste to the beer, thereby making it unmarketable and unfit for use. After importation, however, the corks were subjected in the brewing company's plant to various processes and treatment consuming several days of time, during which the corks were treated, processed, sealed and coated so as to render them useful for the intended purpose. The court found that the process to which the corks were subject did not constitute manufacture; that the corks were manufactured before they

were imported and that the brewing company was not entitled to its refund. In the opinion by Mr. Justice McKenna it is said, l. c. 559:

> "The corks in question were, after their importation, subject to a special treatment which, it is contended, caused them to be articles manufactured in the United States of 'imported materials' within the meaning of Section 25. The Court of Claims decided against the contention and dismissed the petition. 41 Ct. Cl. 389.
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> "The treatment to which the corks were subjected is detailed in Finding 3, inserted in the margin.
>
> "In opposition to the judgment of the Court of Claims counsel have submitted many definitions of 'manufacture,' both as a noun and a verb, which, however applicable to the cases in which they were used, would be, we think, extended too far if made to cover the treatment detailed in Finding 3 or to the corks after the treatment. The words of the statute are indeed so familiar in use and meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition,—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation, we are involved in refinements and in impractical niceties. Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann,* 121 U. S. 609,

7 Sup. Ct. Rep. 1240. *There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'* This cannot be said of the corks in question. A cork put through the claimant's process is still a cork." (Italics supplied.)

In the case of *American Fruit Growers, Inc. v. Brogdex Company,* 283 U. S. 1, the court was obliged to determine whether the process of impregnating the rind of an orange with borax, thereby rendering it resistant to mold and decay, constituted manufacture. In the opinion of Mr. Justice Reynolds, it is said, l. c. 11:

"Answering affirmatively the circuit court of appeals said: 'The product claims define an article of manufacture, since the fruit is the result of a process which is defined and described and not a natural product. The product is a combination of the natural fruit and a boric compound carried by the rind or skin in an amount sufficient to render the fruit resistant to decay. The complete article is not found in nature and is thus an article of manufacture. *Riter-Conley Mfg. Co. v. Aiken,* 121 C. C. A. 655, 203 Fed. 699.' (35 Fed. (2nd) 107.)

"This position, we think, is not tenable.

" 'Manufacture,' as well defined by the Century Dictionary, is 'the production of an article for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery.' Also, 'anything made for use from raw or prepared materials.'

"Addition of borax to the rind of natural fruit does not produce from the raw material an article for use which possesses a new or distinctive form, quality, or property. The added substance only protects the natural article against deterioration by inhibiting development of extraneous spores upon the rind. There is no change in the name, appearance, or general character of the fruit. It remains a fresh orange fit only for the same beneficial uses as theretofore."

De Jonge v. Magone, Collector, 159 U. S. 562, involved a question as to whether certain imported paper constituted "manufacture of paper" or fell within the description of certain specific types of paper which took a higher import duty. The paper in question received certain surface treatment, some of it producing an imitation of leather which was known as "velvet paper." The court in the opinion of Mr. Justice White said, l. c. 567:

"It is not reasonable to suppose that Congress assumed that the manipulation or treatment of particular paper in the completed condition in which produced at a paper mill, by mere surface coating, *a process which did not change its form, but only increased the uses to which such paper might be put,* had the result to cause the article to cease to be paper and to become a manufacture of paper, especially in view of the continued commercial designation of the article as a variety of paper and its sale and purchase in commerce as paper. (Italics supplied.)

"Congress must be presumed to have known that the paper employed in paper hangings and paper for screens or fireboards, was printing paper, sized in the paper mill, and subjected to treatment elsewhere, by which the value of the article as paper was greatly enhanced, and the association of those products with the writing and drawing class of paper in the paragraph in question is convincing evidence that paper hangings were produced was regarded as paper and not as manufactures of paper. Not alone to avoid doubt or confusion, would such products as paper hangings likely be provided for specifically, rather than in association with writing and drawing paper, if deemed to be 'Manufactures' of paper, but as an article clearly a manufacture of paper, to-wit, 'paper envelopes,' was assessed at a duty of twenty-five per cent *ad valorem,* opportunity existed to place paper hangings in the same paragraph, and such would likely have been done if paper hangings had been deemed 'manufactures of' and not 'paper'."

In *Hughes v. City of Lexington,* 277 S. W. 981, the appellant was a corporation engaged in the business of making and selling ice cream. Nevertheless, the City of Lexington contended that the corporation was not engaged in manufacturing within the meaning of the state statutes which exempt from city taxes machinery, material and supplies used in manufacturing. In the opinion by Clark, C. J., it is said, l. c. 982:

"The sense in which the term is here used, as well as the purpose intended to be accomplished by the act, is

quite plain. Obviously, the term 'engaged in manufacturing' was not employed in any technical sense, but must be accorded its ordinary meaning as commonly understood. And, while incapable of exact definition, nevertheless it is true, as was stated in several of the above cases, that according to common understanding and generally speaking, manufacturing consists in the application of labor or skill by hand or machinery to material so that as a result thereof, a *new, different* and useful article of commerce is produced." (Italics supplied.)

The foregoing cases emphasize and reiterate the principle that whether a given process constitutes manufacturing depends upon whether the process results in the creation of a new thing. If that which emerges at the conclusion of the process is the same thing which entered the process at its beginning, notwithstanding some labor and some new materials have been expended upon it during the process—in other words, if the thing retains its identity during the course of the process and after it is completed—then no manufacturing or production has occurred. If the article before the process commenced was a cork and it emerged from the process still a cork, there has been no manufacture. By the same token, the principle as applied to the case at bar leads inevitably to the conclusion that since the armatures in question did not lose their identity during the rewinding process, but were armatures when they entered plaintiff's plant and were still armatures when they left the plant, there was no manufacture.

(b) The Mere Repair, Restoration or Reconditioning of an Article Does Not Constitute Manufacturing of Production.

An essential distinction must be preserved between manufacture which, as above shown, results in the creation of a new article, and mere repair which results only in the restoration of partial injury but does not create a new article. When an article which consists of several component parts sustains wear or suffers injury to one of those parts, the plain economics of the situation dictate that the injured part, if possible, shall be replaced or repaired, rather than that the entire article shall be wastefully discarded. A man may drop his watch and break the balance staff so that its usefulness as a timepiece is, for the time being, destroyed. But in such a case the owner does not throw his watch away and buy another. Instead, he takes it to a skilled mechanic who replaces the broken or damaged part and restores the watch to its former condition of usefulness. No one would argue in such a case that the jeweler had manufactured a watch. The admitted fact is that the owner took a watch to him. True, the watch was damaged and would not operate, but it was, nevertheless, a watch. After the jeweler had repaired the balance staff, it was still a watch—the same watch. It never lost its identity as a watch. Such is the process of repair or restoration as distinguished from the process of manufacture.

The distinction between repair or restoration, on the one hand, and manufacture or construction, on the other

hand, is often called in question and decided in patent cases.

Perhaps the leading case in this field is *Wilson v. Simpson,* 9 How. 109. In that case the owner of a patented planing machine had repaired or reconditioned his machine by placing therein certain new parts, particularly the knives or cutting tools which were the important operative agency of the machine or, as it is sometimes said, the ultimate effective tool. Notwithstanding the fact that the cutting tools were the most vital and important part of the machine and did the very work for which the machine was designed, the court had no difficulty in finding that their replacement constituted only repair of the machine and not manufacture or production of a new machine so as to infringe the patent. In the opinion by Mr. Justice Wayne it is said, l. c. 123:

> "But it does not follow, when one of the elements of the combination has become so much worn as to be inoperative, or has been broken, that the machine no longer exists, for restoration to its original use, by the owner who has bought its use. When the wearing or injury is partial, then repair is restoration, and not reconstruction.
>
> "Illustrations of this will occur to anyone, from the frequent repairs of many machines for agricultural purposes. Also from the repair or replacement of broken or worn-out parts of larger and more complex combinations for manufactures.
>
> "In either case, repairing partial injuries, whether they occur from accident or from wear and tear, is only refitting machine for use. And it is no more than that, though it shall be a replacement of an essential part of a combination. It is the use of the

> whole of that which a purchaser buys, when the patentee sells to him a machine; and when he repairs the damages which may be done to it, it is no more than the exercise of that right of care which everyone may use to give duration to that which he owns, or has a right to use as a whole."

In *Hess-Bright Mfg. Co. v. Bearing Co.,* 271 Fed. 350, the court considered a case involving the alleged infringement of a patent upon a ball bearing. The bearing consisted of a groove of a certain depth with balls exactly fitting it. The vendee of this patented bearing reground or smoothed up the groove, an operation which necessarily resulted in somewhat enlarging the groove. This necessitated installing larger balls to fit the enlarged groove. The question was whether or not the owners of the bearing had constructed a new bearing so as to infringe the patent or whether he had merely repaired his bearing. The court found that there was no manufacture involved in the process and that the patent had not been infringed. In the opinion by Dickinson, district judge, it is said, l. c. 351:

> "Council for plaintiff does not, of course, formulate the claim of right as defendant states it. He does not deny to the vendee of plaintiff the right to repair. What he does deny is any right, by using plaintiff's bearing as a model, to make a new bearing from the raw material of the old one. It is obvious that all this is nothing more than opposing statements of the effect of what the defendant had done. The defendant calls it the repair of old bearings. The plaintiff calls it new construction or reconstruction. Omitting the name properly to be applied to what was done, the fact finding is made that what was done was the regrinding of the groove

of old bearings, and, when required, the substitution of new balls to fit the grooves enlarged by the regrinding.

"The dividing line between repairs and a making over cannot be verbally located. What has been done can with more or less confidence be pronounced to be one or the other, but neither the one nor the other can be defined. The judgment pronounced must in consequence partake of the *ipse dixit* or rescript character. A further consequence is that the adjudged cases provide us with little for our guidance. With no thought of finding a better mode of expression for the clearly presented views of counsel for plaintiff, it may be premised that a feature of the patented bearing is the metallic pathway provided in the form of a groove, which calls for the use of balls of a certain size. The nicety of adjustment required can be most emphatically expressed by the statement that the unit of measurement employed is the ten-thousandth part of an inch. This groove may, from use or abuse, be in need of being remade by regrinding. The lightest repolishing, almost, is such.

"The argument that this is not repair, but a new construction, may be thus expressed: A bearing with a groove of a certain depth, with balls exactly fitting it, is sold by the plaintiff to A. Another bearing, with a different groove, calling for the next larger size balls, is sold to B. The first vendee smooths up the groove in his bearing, thus adopting it to the next larger size of balls. By so doing he has not repaired the bearing sold to him, but out of the material in this old bearing he has made a new one, which is not his old bearing, but a different bearing of the B type. In other words the old A bearing has lost its identity by destruction, and a new

bearing, B, has been made. In a sense this is, of course, true; but it is only true in a sense. Identity is not lost by a mere change in size. The rule of which we are in search is a practical rule for the guidance of practical men in practical business. What the patentee sells is a concrete thing. It is a bearing. As long as it remains the bearing of the patent, it is what the patentee sold. The moment it becomes something else, the patentee is not concerned with it. The groove of the patent is still the groove of the patent, although enlarged. It no more loses its identity by enlargement than a river does by the change of the volume, due to the flow and ebb of the tide, or by the shoaling or deepening of its channel by the wash of its current.

"The balls are no part of the groove, but something used with it. There is no thought of denying the right of a vendee to repair balls. His right is not limited to any size of ball. The balls may be replaced without thought of infringement of any patent right. To deny vendee the right to smooth up a groove is to deny him all right to make repairs to the patented features of what was sold to him. The right cannot be limited to the use of the same balls as before. The only limitation is that he may repair, but cannot make a new bearing out of the material of the old. What is the one and what the other the facts of each case must determine. The line, as before observed, is most difficult to draw in words of description; it is by no means so difficult to draw in fact.

"In the instant case our fact finding is that what defendant has done is to make repairs, and that it has not infringed upon the patent rights of plaintiff. The name given to anything is not necessarily indicative of what the thing is. A fact upon

which defendant lays much stress has some interest as a coincidence, but no other value. The fact referred to is that the plaintiff itself did what the defendant has done, and the department in charge of such work was called by plaintiff its 'Repair Department'. We attach as little importance to the distinction between repairing and selling second-hand bearings after they have been repaired."

In the case of *Ely Norris Safe Co. v. Mosler Safe Co.* (C. C. A. 2), 62 Fed. (2d) 524, the defendant was held not to have constructed or manufactured, but to have merely repaired a safe, thereby committing no infringement of plaintiff's patent. In the course of the opinion the pertinent facts and applicable law are stated as follows, l. c. 527:

"The second claimed infringement is by the Halifax safe. This safe was sold by the plaintiff in 1908 to the First Bank of Fallis, at Fallis, Oklahoma. Shortly thereafter it was burglarized. The insurance company refused to pay the loss, and a suit followed. A witness, an employee of the Mosler Safe Company, testified that, after the burglary, the safe was shipped to the Mosler Safe and Lock Company. It could not be unlocked when received and a hole was drilled in the back of the safe and a rod placed through it to trip the lock mechanism of the inner door. There is no evidence of a so-called explosion chamber. This safe was then resold to the Bank of Halifax, of Halifax, Pa., as a second-hand safe. The hole was drilled in 1911. In March, 1930, one of the employees of the York Safe and Lock Company saw this safe and recognized it as a safe body of plaintiff's construction bearing the same number as a safe which was sold to the First Bank of Fallis. It then contained a removable raid chest, and on the door of the inner chest

there appeared the name of Mosler. One of plaintiff's witnesses saw it in 1930, and stated that a hole had been drilled in the door and that a metal plug had been hammered into the hole. From this it is argued that it was reconstructed and sold by the defendant. It is said to be an infringement, but it does not appear when the hole was drilled or by whose authority or request it was drilled and whether prior to or after it was sold to the Bank of Halifax. It is quite apparent that when the locking device went wrong and it became necessary to drill the hole in the door to repair it, it was later plugged, but the defendant cannot be charged with this as constituting an act of infringement. The repair may be assumed to have been made on instructions from the bank. *It was not the construction of a safe. There is testimony that it is the practice of safe manufacturers to place their name upon second-hand safes when they sell them. This resale of a second-hand safe in the manner described and the repair necessarily made to adjust the locking device, first drilling a hole, cannot be regarded as an act of infringement.* We agree with the court below in holding it was not." (Italics supplied.)

In *Foglesong Machine Co. v. Randall Co.* (C. C. A. 6), 239 Fed. 893, the defendant, being the owner of a patented machine for the stuffing of horse collars, was accused of infringing the patent by making certain repairs upon the machine. The court found that certain parts of the machine were perishable in that they were subject to greater wear than other parts. In that connection the court said, l. c. 895:

"The question for decision is: Did the defendant repair or reconstruct the machine which it purchased from the Grand Rapids Company? In supplying a new hopper, stuffing rod nose, and disc, the defendant

merely returned to use the injured or lost portions of the mechanism. This constitutes repairing, and not reconstruction."

At another point the court said, l. c. 896:

"The machine was not so broken and worn out as to require replacement. The wear and injury were but partial. Under such circumstances, repair is not reconstruction, but restoration, that the mechanism may be kept up to the full performance of its duty."

In *Goodyear Shoe Machine Co. v. Jackson* (C. C. A. 1), 112 Fed. 146, it is said in the opinion by Colt, C. J., l. c. 151:

"Where the patent is for a machine, which commonly embraces the combination of many constituent elements, the question of infringement by the purchaser will turn upon whether the machine is only partially worn out or partially destroyed, or is entirely worn out, and so beyond repair in a practical sense. In the case of a patent for a planing machine composed of many parts it was held that the replacement of the rotary knives, 'the effective ultimate tool' of the machine, was repair, and not reconstruction, *Wilson v. Simpson,* 9 How. 109."

A further statement of the principle involved, together with a citation of many cases, is found in *Miller Hatcheries v. Incubator Co.* (C. C. A. 8), 41 Fed. (2nd) 619.

In *State v. J. J. Newman Lumber Co.* (Miss.), 59 So. 923, the distinction between manufacture and repair is clearly stated by the Supreme Court of Mississippi as follows, l. c. 926:

"A reasonable definition may be given to 'manufacturing' (Century Dictionary) as the system of

> industry which produces manufactured articles, and to 'manufacture' as the production of articles for use from raw or prepared materials, by giving to these materials new forms, qualities, and properties, or combinations, whether by hand labor or machinery, used more especially of production in a large way by machinery, or many hands working co-operatively. 'Repair' is to make whole or restore an article or thing to its completeness. In the general knowledge of the affairs of business and life, it will hardly be difficult to class those persons who are engaged in such employment."

Applying the principles announced and reiterated in the foregoing cases to the facts of the case at bar, it is clear that the injury to the used, second-hand armatures which the plaintiff acquired and rewound was but partial. Only the wire coils were injured or destroyed. They were not "entirely worn out, and so beyond repair in a practical sense" (*Goodyear Shoe Machinery Co. v. Jackson,* 112 Fed. 146, 151), is conclusively proved by the fact that the plaintiff did restore them to their former condition of usefulness by the simple expedient of installing the new coils. The basic thing or part is the core consisting of the shaft, commutator and laminated core, which was identified by Mr. Daniels, a witness for the plaintiff [R. 80].

> "The Court: Often you would build it on—what do you call the basic thing, the coil?
>
> "The Witness: The armature is the basic thing, and we would put new wires on it, and turn it."

The physical facts speak for themselves. This Court has before it a box of armatures, Defendant's Exhibit C, showing armatures in various stages of rewinding. These

exhibits themselves are the most eloquent testimony obtainable that the armatures before rewinding were not entirely worn out and were not beyond repair in any sense, but had sustained only partial wear or injury. These armatures were not "junk," and had not been discarded by their former owners as is contended by the appellant. On the contrary, they had been carefully preserved and had been sent to this plaintiff either directly or through jobbers so that they might be rewound or exchanged for other armatures of a similar type which had already been rewound.

Harry E. Seneker, testifying for the plaintiff, when asked what percentage of the armatures were procured from jobbers, stated [R. 97]:

"A. Approximately 95 per cent."

If these armatures were so far worn out and so beyond repair that they had ceased to have any value over and above the melting pot value of the metal contained in them, why did plaintiff pay an average of from fifty cents to one dollar for them? If the Court can draw upon its fund of common knowledge and take judicial knowledge of the fact that there is such a thing in the steel industry as scrap, then it must also know that steel scrap is regularly bought and sold as a commodity of commerce at a price of a few dollars per ton. The current price for scrap steel is now $11.50 per ton, slightly more than a half cent per pound.

There was no direct evidence that the used, second-hand armatures which the plaintiff rewound were, prior to the rewinding, so worn out and beyond repair that they had ceased to be armatures. On the contrary, under the undisputed evidence in this case, it is conclusively proved

and established that these armatures had a commercial value to the plaintiff and to other concerns engaged in the rewinding business in excess of their "junk value." It is obvious that the comparatively great commercial value of used armatures in excess of the melting pot value of the metals contained therein is due entirely to the fact that these armatures may be restored to their former condition of usefulness and mechanical efficiency by a process of repair. This is the principle which underlies the decision of the Supreme Court in *Cadwalader v. Jessup & Moore,* 149 U. S. 350. In that case the Supreme Court was called upon to decide whether certain imports of old india rubber shoes were dutiable as crude india rubber or as articles composed of india rubber. The shoes were so worn as to be beyond repair and for that reason they had ceased to be shoes and were valuable only for the rubber which they contained. It is said in the opinion by Mr. Justice Blatchford at page 354:

> "The uncontradicted testimony is to the effect that the only commercial use or value of the old india rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the india rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the india rubber they contained, as a substitute for crude rubber, *and not by reason of any preparation or manufacture which they had undergone;* that they could not fairly be called 'articles composed of india rubber,' and as such dutiable at 25 per centum *ad valorem;* and that, although the shoes may have been originally manufactured articles composed of india rubber, they had lost their commercial value as such articles, and substantially were merely the material called 'crude rubber.' They were not india rubber

> fabrics, or india rubber shoes, because they had lost substantially their commercial value as such." (Italics supplied.)

The appellant herein compares the above case to the case at bar, stating that the india rubber shoes had lost their commercial value as such articles, and substantially were the material called "crude rubber". It is agreed that they are correct in reference to the shoes, because they were not imported as used shoes to be repaired, but only for their value as crude rubber. In the instant case the armatures are repaired to restore them to their former condition of usefulness. If the plaintiff had converted the armatures into some other automobile part then there might be some color of right in the appellant's contention; in fact, this action would never have been instituted.

The appellant bases practically its entire case upon the decision in the case of *Clawson & Bals v. Harrison,* 108 Fed. (2d) 991. In order to get a clear picture of this case it is necessary to refer to the findings of fact and conclusions of law as found by the trial court. This case is not published in the National Reporter System, but may be found in Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, Paragraph 9219. For the convenience of this Court the findings of fact and conclusions of law made and entered by the court are submitted in the appendix to this brief [App. p. 28].

Clawson & Bals had new connecting rod forgings made for them, which they machined and babbitted. During part of the period covered by their suit, they removed all marks of identification from rods manufactured by General Motors Corporation and subsidiaries. They also rebabbitted used and second-hand connecting rods. At

paragraph 10 of the findings of fact the trial court found:

> "Plaintiff kept but one stock with respect to each number and had but one outright price with respect to the rods, irrespective of whether they were produced from entirely new castings or from scrap, and regarded the articles made from scrap as equivalent to any similar products made entirely from virgin metal. The rods made from scrap were in competition with similar products made entirely of virgin metal and were just as serviceable. They were held out for sale and sold on the same basis and under the same warranties as the connecting rods produced from entirely virgin forgings. In other words, plaintiff made no distinction between such connecting rods in the numbering, cataloging, selling, billing, advertising, shipping, labeling, pricing, marketing, quality, warranty, guaranty or otherwise."

As stated before, Clawson & Bals dealt in three kinds of connecting rods; newly-manufactured ones, rebabbitted rods on which the identification marks had been removed and other rebabbitted rods. They at all times held themselves out as manufacturers, as in truth they were. As manufacturers they paid excise tax on all sales of rods, but did not include as part of the sale price the exchange value of the old rods received as part of the selling price. Later the Government assessed a total of $54,232.02, representing tax and interest on the additional selling price as represented by the value of the old rods received in exchange. Immediately Clawson & Bals objected on the ground that they were only rebabbitters of a part of the rods sold by them and that the additional tax paid by them of $54,232.02 should be refunded as representing the tax on the sale of rebabbitted connecting rods.

It is submitted that the facts in the Clawson & Bals case are entirely different from the facts in the case at bar. Clawson & Bals did manufacture new connecting rod forgings from virgin metal, they removed identification marks from a part of the rods rebabbitted by them. they were manufacturers and held themselves out as such, whereas the appellee herein never manufactured an armature, or held itself out as a manufacturer, never removed any identification marks from the armatures and, in fact, never did more than repair used and damaged armatures.

The appellant also cites as authority *The King v. Biltrite Tire Co.,* 1937 Canadian Law Reports 1, and *The King v. Boultbee, Ltd.* (1938), 3 Dominion Law Reports 664. However, it is contended by appellee that our courts must give precedent to the cases decided in our own country and must consider as law the overwhelming authorities therein established before resorting to cases decided in foreign courts.

In view of the uncontradicted testimony in the case at bar that the used, second-hand armatures which plaintiff acquired and rewound, by reason of the preparation and manufacture which they had previously undergone, had a commercial value as armatures which was far in excess of the junk value of the metals therein contained. It is respectfully submitted that the findings and judgment of the learned trial court were correct and should be affirmed.

II.

The Rewinding of Armatures Has Been Specifically Held in Other Cases Not to Constitute Manufacturing.

The applicability of the tax imposed by Section 606(c) of the Internal Revenue Act of 1932 to the sale of rewound automobile generator armatures has been decided in favor of the taxpayer by the District Courts of the United States in two other cases.

The first such case was *Monteith Bros. Company v. United States,* before the Hon. Thomas W. Slick, of the Northern District of Indiana. No opinion was delivered by the court and the case is not published in the National Reporter System. The findings and judgment of the court may be found, however, in Commerce Clearing House, 1936 Standard Federal Tax Service, Vol. 4, paragraph 9492; and for the convenience of this Court there is submitted an appendix to this brief, in which are printed in full the findings and judgment of the court in the *Monteith* case [App. p. 1]. Judge Slick found and held that the sale of rewound armatures did not come within the purview of Section 606(c) of the Internal Revenue Act of 1932. This case also embraced the sale of rebuilt generators and rebabbitted connecting rods and decided their taxability in the same manner.

In *Becker-Florence Co. v. United States,* Hon. Albert L. Reeves of the Western District of Missouri, on December 27, 1938, held that the tax imposed by Section 606(c) of the Internal Revenue Act of 1932 was not applicable

to the sale of rewound and reconditioned automobile armatures and generators. The opinion and decision of the court in that case are not published in the National Reporter System, but may be found in Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, paragraph 9259, and for the convenience of this Court are submitted in the appendix to this brief [App. p. 21]. Judge Reeves, recognizing the necessity of equality and uniformity in the administration of taxing statutes, said in the course of his opinion:

> "To give the statutes the meaning contended for by the government would involve endless complications as affecting dealers, garage owners and repair men in general. No definite line could well be drawn and twilight zones would develop so frequently and from so many angles that a just and fair and practical enforcement of the law would become impossible."

This same section of the Internal Revenue Act of 1932 was also called into question in five cases involving the taxability of the sales of rebabbitted connecting rods. which were decided by the District Court in favor of the taxpayer and against the government.

The first of these cases was *Hempy-Cooper Mfg. Co. v. United States,* before the Hon. Merrill E. Otis, of the Western District of Missouri. The opinion of Judge Otis in that case is not published in the National Reporter System, but may be found in Commerce Clearing House, 1937 Standard Federal Tax Service, Vol. 4, paragraph 9421. For the convenience of this Court the opinion of Judge Otis and the findings of fact and conclusions of law made and entered by the court are submitted in the appendix to this brief [App. p. 5].

In the *Hempy-Cooper* case Judge Otis specifically held that whether a given operation constituted manufacture or repair is to be determined by what is done during the process. In the course of the opinion it is said:

> "The connecting rod is the same connecting rod after repairing is done as it was before. It has not lost its identity. Whether a given operation is manufacturing or repair of something that already has been manufactured does not depend upon what is done with the thing after it has been repaired or after it has been worked upon. It depends upon what has been done. If it is merely a repair operation, if it is handed back to some other person who has brought it for the purpose of having it repaired, it is still nothing but a repair operation if, after the work has been done, it is laid upon the shelf and sold the next day or the next week or the next year. In neither case is the identity of the thing lost."

Another case in which it was held that the rebabbitting of connecting rods does not constitute manufacture is *Bardet v. United States,* decided by Hon. Fred Louderback of the Northern District of California on May 18, 1938. The court delivered no opinion and the case is not published in the National Reporter System, but may be found in Commerce Clearing House, 1938 Standard Federal Tax Service, Vol. 4, paragraph 9530. For the convenience of this Court the findings of fact and conclusions of law in that case are submitted in the appendix to this brief [App. p. 14].

The third case in which it was held that the rebabbitting of connecting rods does not constitute manufacturing is *Con-Rod Exchange, Inc., v. Henricksen,* 28 Fed. Supp. 924, decided by Hon. Leon R. Yankwich, August 17,

1939. In the course of the opinion Judge Yankwich stated:

> "We do not have here a process of manufacture or production of an article of commerce. We have merely a process of renewing, for further use, a standard article of commerce—an automobile part—by resurfacing a worn-off portion of it with a thin layer of metal alloy, which in all probability, does not enhance its weight by more than a few ounces. 'Manufacture is transformation—the finishing of raw materials into a change of form for use.' *Kidd v. Pearson*, 1888, 128 U. S. 1, 20, 9 S. Ct. 6, 10, 32 L. Ed. 346. Here there is no change of form, identity or function. The rehabilitated article is not a new article, but one which has been restored to its original shape and use by the mere resurfacing of the worn-off surface on part of it. * * *
>
> * * * * * * * *
>
> "For the function of repairing is to make usable an article which without it could not be used. A frying pan without a handle is useless as a frying pan. So is a chair in which the seat or a leg is broken. The workman who adds a new handle to a pan, or repairs the seat or leg of a chair by replacing the worn-out portion with new material, in effect, takes something out of a scrap heap or a junk pile and restores it to usefulness.
>
> "Still we would be doing acts of violence to the English language if we called these acts of repairing acts of manufacture."

In *Moroloy Bearing Service of Oakland, Ltd., v. United States of America,* Hon. Martin I. Welsh of the Northern District of California, Southern Division, decided July 16, 1940, likewise held that the manufacturer's excise tax on the sale of automobile parts did not apply to the

sale of rebabbitted connecting rods. At the present time the opinion in that case is not published in the National Reporter Service, nor has it appeared in the Federal Tax Service. For the convenience of this Court a copy of the opinion by Judge Welsh is submitted in the appendix to this brief [App. p. 37]. The following excerpts from the opinion are particularly pertinent here:

> "The evidence shows the connecting rods which plaintiff rebabbitted were in their original state manufactured by others, and only came into the hands of the plaintiff when certain parts of them became defective either from the burning out of the babbit through friction while in operation, or through lack of proper lubrication, or on account of other causes.
>
> "In no manner did the evidence show the plaintiff manufactured the connecting rods themselves, but, on the contrary, the evidence clearly showed that plaintiff was engaged in the repair and rehabilitation of connecting rods manufactured by others, when they became outworn and defective from use.
>
> "In Bouvier's Law Dictionary (Rawl's Revision, Unabridged) the words manufacture and repair, when used as verbs are defined as follows:
>
> " 'Manufacture—to make or fabricate raw materials by hand, art, or machinery, and work into forms convenient for use.
>
> " 'Repair—to restore to a sound state after decay, injury, delapidation, or partial injury.'
>
> "It would be just as logical to hold that a shoe cobbler was a manufacturer of shoes that were brought to him for repair because he nailed or sewed soles and heels on the shoes in the process of repairing them, as to hold that a mechanic was a manufacturer of connecting rods because he rehabilitated

> them. The process is a repair in the one case, just as it is in the other. That plaintiff is repairing its own rods for sale, whereas the shoe cobbler is repairing shoes for others is not significant. Whether or not a process is one of repair does not depend on the condition of the title to the repaired article."

The most recent case in favor of the taxpayer, deciding the taxability of rebabbitted connecting rods was *J. Leslie Morris Company, Inc. v. United States of America,* decided July 24, 1940, by the Hon. Paul J. McCormick, District Judge. This case is not reported at the present time, accordingly a copy of the opinion of Judge McCormick is submitted in the appendix to this brief [App. p. 39].

In the armature and generator cases heretofore cited the mechanics of the repairing were practically identical with the facts in the case at bar. The last five cases cited differ only as to the parts involved; the mechanical operations are, of necessity different, but are still repairs of used parts. In all seven cases the repairs commenced with certain used parts; when the repairing was completed the used parts were still present. They had not lost their identity during the process. The results of the process in all of the cases were identical.

The first case involving excise tax on repaired automobile parts under the Internal Revenue Act of 1932 was *Skinner v. United States,* 8 Fed. Supp. 999. In this case the court held that the manufacturer's excise tax imposed by Section 602 of the Internal Revenue Act of 1932 did not apply to retreaded tires, because retreading is not manufacturing, but is merely repair. At page 1004 it is stated in the opinion:

> "The court is of the opinion that plaintiff is not a manufacturer or producer within the meaning of

> the statutes and regulations. He is, as stated by the witness Roper in the record (page 9), 'a repairman' and should be classified and by the court is classified as such."

It is pointed out that the Bureau of Internal Revenue, in S. T. 648, Internal Revenue Bulletin, Cumulative Bulletin XII-1, page 384, has itself adopted, and is still following the test laid down in the *Skinner* case. That test is whether the identity of the old tire is lost in the process. If so, it is manufacturing; if not, it is merely repairing [App. p. 44].

Applying the test laid down in the *Skinner* case to the case at bar, it is readily seen that no tax should attach upon the sale of the armatures rewound by appellee. To do otherwise would be to perpetrate the greatest inequality in the administration of the tax laws. This point of identity was covered at the trial of this case by Mr. Daniels, where he testified on direct examination [R. 75-76]:

> "Q. When an old armature was received for rewinding, were the component parts of the armature separated?
>
> "The Witness: The only part that was removed was the winding of the wire from the armature.
>
> "Q. Were any steps taken to removed the existing identity that might be on the armatures?
>
> "The Witness: No, there was no identification removed."

The unanimity of opinion of the courts in the seven cases above presented which deal directly with the question of the taxability of the sale of rebuilt or repaired automobile parts is not without significance, particularly since they are directly in line with the other authorities herein cited.

III.

Taxing Statutes Must Be Strictly Construed and Should Be So Construed as to Produce Uniformity and Equality in Their Application. Their Provisions Cannot Be Extended by Implication.

There was no dispute at the trial of this case as to the methods employed by the plaintiff in rewinding automobile generator armatures. In fact the method was covered by a series of 21 pictures and an explanatory statement for each, which were introduced as a joint exhibit. (Joint Ex. No. 1.)

The government produced no direct evidence whatever that the rewinding of armatures is a manufacturing process or that the rewinding of armatures constitutes the manufacture of armatures.

Being totally without any direct evidence that rewinding is a manufacturing process, the government apparently attempted to prove its case by the use of a syllogism which runs something like this: All large establishments employing many men, using many machines and turning out a large volume of work, doing business on a large scale and publishing catalogues in which their product is described, are manufacturing establishments; plaintiff has all these characteristics; therefore, plaintiff is a manufacturing establishment. The major premise of this syllogism is, of course, untrue, and the conclusion is, therefore, completely false. Size and extent and volume of business do not constitute the test of manufacture. It is common knowledge that there are many machine shops much larger than plaintiff's which manufacture nothing, but are engaged only in repair work.

Much emphasis was also placed on the fact that the appellee was incorporated "to carry on the business of

manufacturing and assembling armatures * * * and to market them." [R. 106.] This corporation was organized in 1922 [R. 57], ten years before the enactment of the Revenue Act of 1932. The articles of incorporation were so broad that appellee could do practically anything that an individual could do. [R. 106-109.] The test is not what the articles of incorporation recite, but what was actually done during the period involved.

If the taxing statute here involved is to be applied and administered by testing whether a company is a manufacturer or a repairman by determining whether it does business on a large scale or on a small scale, and whether it employs many men or few men, and whether its articles of incorporation authorize it to manufacture or not, then the administration of the taxing statute will result in the greatest inequality and lack of uniformity. The rewinder who sells several thousand armatures a month will be taxed because he is large and the rewinder who sells only a few armatures a month will not be taxed because he is small. The rewinder empowered to manufacture armatures will be taxed because of those powers, even though he is not exercising them.

The appellee herein distributed printed catalogues, wherein were listed the armatures sold, showing the original manufacturer's name and parts number, in addition to appellee's code number. [R. 67-73.]

The mere fact that ownership of the armatures was vested in the appellee does not affect its status as a repairer. There is nothing to prevent appellee from acquiring title to used armatures or other automobile parts and repairing them before offering them for sale. Certainly there is no conflict here between the repairman being also the owner and vendor or only the repairman of the used armatures for others.

The true test, and the only test, is whether the rewinding process itself results in the creation of a new article, or whether it only accomplishes the restoration of an article already created. That is the test which can be applied to every rewinder and will result in absolute equality and uniformity of administration of the taxing statute.

In *City of Louisville v. Zinmeister* (Ky.), 222 S. W. 958, l. c. 959, the Supreme Court of Kentucky said:

> "In the recent case of *Lorrilard Co. v. Ross, Sheriff,* 183 Ky. 217, 209 S. W. 39, we held that the word 'manufacture,' in the sense in which it is employed in the statutes quoted above, does not import the means or methods employed, or the nature or number of processes resorted to, or the size of the factory or the number of hands it employs, or the volume of machinery in use, but the result accomplished, whether the article is manufactured or not."

It is elementary that taxing statutes are to be construed strictly in favor of the taxpayer. This means that the tax must be based upon express statutory authority and cannot be imposed by implication. In *Hartranft v. Wiegmann,* 121 U. S. 609, it is said in the opinion by Mr. Justice Blatchford, at page 616:

> "We are of the opinion that the decision of the Circuit Court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on a citizen upon vague or doubtful interpretations.' *Powers v. Barney,* 5 Blatchf. 202; *United States v. Isham,* 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds,* 11 Exch. 190, 191; *Adams v. Bancroft,* 3 Sumn. 384."

In *Miller v. Standard Nut Margarine Co.,* 284 U. S. 498, it is stated in the opinion by Mr. Justice Butler, at page 508:

> "It is elementary that tax laws are to be interpreted liberally in favor of taxpayers and that words defining things to be taxed may not be extended beyond their clear import. Doubts must be resolved against the government and in favor of taxpayers. *United States v. Merriam,* 263 U. S. 179, 188, 29 A. L. R. 1547, 44 S. Ct. 69; *Bowers v. New York & A. Lighterage Co.,* 273 U. S. 346, 350, 47 S. Ct. 398."

In *Erskine v. United States* (C. C. A. 9), 84 Fed. (2d) 690, 691, it is said:

> "Such revenue acts must be construed strictly in favor of the appellant sought to be charged as importer. He is 'entitled to the benefit of even a doubt.' Tariff Act 1897, 30 Stat. 151; *United States v. Riggs,* 203 U. S. 136, 1939, 27 S. Ct. 39, 40, 51 L. Ed. 127; *Hartranft v. Wiegmann,* 121 U. S. 609, 616, 7 S. Ct. 1240, 30 L. Ed. 1012; *Miller v. Standard Nut Margarine Co.,* 284 U. S. 498, 508, 52 S. Ct. 260, 76 L. Ed. 422."

In *Bankers Trust Co. v. Bowers* (C. C. A. 2), 295 Fed. 89, 96, it is said that the construction placed on a statute should avoid unjust consequences unless the act compels such a result. This is particularly true of a taxing statute where absolute uniformity and equality are to be preserved.

In *Alaska Consolidated Canneries v. Territory of Alaska* (C. C. A. 9), 16 Fed. (2d) 256, 1.c.258, it is said in the opinion by Rudkin, C. J.:

> "Of course there is a presumption that laws, and especially tax laws, will have a prospective operation

> only; but there is a like presumption that they are intended to operate uniformly and equally upon all and, in the end, the question is one of legislative intent."

And in *Atlantic Pipe Line Company v. Brown County*, 12 Fed. Supp. 642, Judge Atwell said, at page 646:

> "Discrimination is synonymed with distinction. It is the antithesis of fairness. It means, in this case, the demand from the complainant of a higher rate or of a higher value, and this disadvantage involves a correlative discrimination. Taxation must be uniform and without such favoritism."

The contention of the government that some distinction may be made predicated upon the fact that the plaintiff is a large operator would seem to be specifically refuted by the case of *Spreckels Sugar Refining Co. v. McClain* (C. C. A. 3), 113 Fed. 244, opinion by Circuit Judge Dallas. In that case the statute imposed an excise tax on all gross receipts in excess of the sum of $250,000.00 per annum. A monthly return was required by the law, which did not specifically require anything but an annual payment of tax. The Spreckels Company filed a return for the first month, showing receipts in excess of the sum of $250,000.00, and it was contended that the law should be construed so as to force the company to pay the tax monthly. The court held that the construction of the act contended for by the government was "so questionable as to render it inadmissible to impose a duty upon a citizen," citing the *Hartranft* case, and further held that such an inequality in the administration of the law could not be imposed upon the plaintiff simply because the returns were so large that its first monthly return

exceeded $250,000.00. The court said in the opinion, l.c.247:

> "We have already pointed out that it is not necessary to put an interpretation upon this section which might involve such inequality in its administration and, except by necessity, no such interpretation could be justified."

The opinion of the learned trial court in this case [R. 11-25] discloses that in every respect the principles announced in the foregoing authorities were closely adhered to. After carefully reviewing the evidence which had been adduced at the trial the court stated [R. 24]:

> "If a person with mechanical skill were asked to rewind an armature, by one who paid him the value of his labor and materials, would the process be one of manufacturing? I do not think so. The fact that this company does this on a large scale does not alter the situation. In neither case are we dealing with a 'manufacturer' or 'producer'."

On the question of the wording of the articles of incorporation, on which the appellant lays great emphasis, the trial court said [R. 105]:

> "Under these articles, they can sell everything but liquor. They can do bill-posting, and everything else. I don't know what good this will do."

Thus it can be seen that the court weighed the very points which are here urged by the appellant and specifically decided that large size of the plant, number of employees and authorization of the articles of incorporation would not constitute the test of the application of the statute.

It is a cardinal principle of tax law that any doubt shall be resolved against the taxing authority. To do

otherwise in this action would be to work great hardship upon the appellee and controvert all established law on that point.

In deciding *J. Leslie Morris Company, Inc., v. United States of America* Judge McCormick laid special emphasis on this question of interpretation of statutes [App. p. 39].

The Bureau of Internal Revenue has no authority to attempt to amend any congressional act or extend the meaning thereof by regulation. This principle is clearly pointed out by the Supreme Court in *Koshland v. Helvering,* 298 U. S. 441, 446.

Had Congress intended the tax herein involved to attach to the sale of repaired automobile parts such provision would have been put in the Internal Revenue Act of 1932. Failure to put such provision in that act shows clearly that it intended for the tax to attach to the sale of only newly-manufactured parts.

Plaintiff respectfully submits that, in the public interest, as well as to prevent injustice to this plaintiff, the judgment of the learned trial court should be sustained to the end that fairness, equality and uniformity in the administration and collection of federal manufacturer's excise tax shall be insured.

Conclusion.

It is submitted that the evidence supports the findings of fact, conclusions of law and opinion of the trial court, and that the judgment should be affirmed.

Respectfully submitted,

DARIUS F. JOHNSON,
Attorney for the Plaintiff-Appellee.

July, 1940.

APPENDIX TO APPELLEE'S BRIEF.

(Reprinted from Commerce Clearing House 1936 Standard Federal Tax Service, Vol. 4, Para. 9492.)

Monteith Brothers Company, plaintiff, v. United States of America, defendant.

District Court of the United States for the Northern District of Indiana, South Bend Division. October Term, 1936. Judgment entered October 5, 1936.

Excise tax on automobile parts and accessories. Since not specifically mentioned under Sec. 606(c) of the 1932 Act, rewound, rebuilt, and repaired armatures, and rebuilt and repaired generators, and rebabbitted, repaired and rebuilt connecting rods are held not taxable as automobile parts and accessories under that section.

See: Reg. 46, Art. 41, at Para. 2614, Vol. 3.

SLICK, D. J.: Come now the parties by counsel, and this cause being at issue is submitted to the Court for trial without the intervention of a jury, and the parties having filed their written stipulation wherein they agreed that all of the allegations in plaintiff's complaint may be taken by the Court as true and proven, except the allegation wherein the plaintiff charges that it is not a manufacturer or producer and the Court having taken the admitted allegations of said complaint as true and proven and the Court having heard the argument of counsel and the Court being duly advised in the premises finds:

(FINDINGS)

1. Monteith Brothers Company, plaintiff herein, is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana and during the times hereinafter mentioned had its office and prin-

cipal place of business in the City of Elkhart, State of Indiana, and within this judicial district.

2. Plaintiff made and filed its manufacturer's excise tax in compliance with the demand of the Collector of Internal Revenue of defendant under Paragraph C, Section 606, of the Revenue Act of 1932, for the sum of Five Hundred ($500) Dollars and because of said demand did pay to the United States Collector of Internal Revenue said sum of Five Hundred ($500) Dollars on the 27th day of September, 1934.

3. On the 15th day of November, 1934, plaintiff filed its claim for refund of said Five Hundred ($500) Dollars manufacturer's excise tax so paid to the Collector of Internal Revenue of the United States and asked for a refund and repayment to plaintiff of said sum of Five Hundred ($500) Dollars for the reason that no tax had accrued against the plaintiff under Section 606 of the Revenue Act of 1932; that said demand for refund was by the Collector of Internal Revenue of the United States denied and rejected on the 26th day of June, 1935. That said sum of Five Hundred ($500) Dollars so paid on said alleged claim of the defendant was paid because of the demand for payment by defendant under and pursuant to Section 606 of the Revenue Act of 1932, which tax was not assessable for the reason that plaintiff did not come within said Section 606 of said Revenue Act of 1932.

4. That for more than ten (10) years last past and next preceding the filing of this action plaintiff was engaged at Elkhart, Indiana, in the business of rewinding, rebuilding and repairing armatures, rebuilding and repairing generators, rebabbitting, repairing and rebuilding connecting rods for automobiles; that said rewound, rebuilt and repaired armatures, rebuilt and repaired gener-

ators, rebabbitted, repaired and rebuilt connecting rods so handled by the plaintiff were for many years preceding the passage of the Revenue Act of 1932 extensively advertised and were well known commercial commodities in the automobile industry.

5. That the plaintiff has not included any of said sum of Five Hundred ($500) Dollars for recovery of which this action is filed, it disposed of its said product described in said complaint and has not collected the same or any part thereof from any of plaintiff's customers, nor from any other source.

6. That said rewound, rebuilt and repaired armatures and rebuilt and repaired generators and rebabbitted, repaired and rebuilt connecting rods as described in plaintiff's complaint and on which said tax was assessed and paid did not, nor did any of the same come within the purview of Paragraph C, Section 606 of the Revenue Act of 1932 for the reason that none of said articles described in plaintiff's complaint and on which said taxes were assessed and paid are spark plugs, storage batteries, leaf springs, coils, timers or tire chains. That the levying of a tax upon the rewound, rebuilt and repaired armatures, rebuilt and repaired generators and rebabbitted, repaired and rebuilt connecting rods, or either of them, as set out in plaintiff's complaint is an unlawful assessment; and levying and collecting of such tax. That no tax under Section 606 of the Revenue Act of 1932 can be imposed upon the sale of rewound, rebuilt and repaired armatures, rebuilt and repaired generators and rebabbitted, rebuilt and repaired connecting rods, because the same do not come within the Revenue Act of 1932.

7. That on the 21st day of July, 1934, the Collector of Internal Revenue for the defendant, The United States

of America, notified plaintiff in writing that the Internal Revenue Department of defendant, had pursuant to Paragraph C, Section 606 of the United States Revenue Act of 1932 assessed a tax against plaintiff in the sum of Eight Thousand Six Hundred Twenty-two and 1/100 ($8,622.01) Dollars as a manufacturer's excise tax claimed by the defendant covering the period from June 21, 1932, down to and including March 1, 1934, together with interest thereon in the sum of One Thousand Seventy-one and 93/100 ($1,071.93) Dollars, making a total tax and interest claimed by the defendant for said period from June 21, 1932 to March 1, 1934 of Nine Thousand Six Hundred Ninety-three and 94/100 ($9,693.94) Dollars and at said time the Internal Revenue Department of the defendant demanded payment of said sum of money. The Court further finds that in pursuance of such notice and demand of the defendant the plaintiff herein has paid to the Collector of Internal Revenue of the defendant for the use and benefit of the defendant the sum of Six Thousand Five Hundred Sixty-four and 64/100 ($6,564.64) Dollars:

8. That said taxes so paid by the plaintiff to the defendant as in its complaint set out were paid upon an illegal assessment and that said sum of Five Hundred ($500) Dollars so paid by plaintiff to the Internal Revenue Collector for the defendant on September 27, 1934, should be paid by the defendant to the plaintiff.

It is therefore considered, adjudged and decreed by the Court that plaintiff have and recover of and from the defendant the sum of Five Hundred ($500) Dollars, together with its costs and charges paid, laid out and expended, to which judgment of the Court the defendant, United States of America, at the time duly excepted.

(Reprinted from Commerce Clearing House, 1937 Standard Federal Tax Service, Vol. 4, Para. 9421)

Hempy-Cooper Manufacturing Company, a corporation, Plaintiff v. United States of America, Defendant.

District Court of the United States for the Western District of Missouri, Western Division. No. 9654. May 6, 1937.

Excise Tax on automobile parts and accessories.—Upon the facts, taxpayer is held to have been engaged in the repair of connecting rods and not the manufacture thereof, so that it was not taxable on their sale.

See Reg. 46, Art. 41 at 373 CCH Para. 2614.175.

Messrs. Delos C. Johns and W. B. Cozad, of the firm of Morrison, Nugent, Wylder and Berger, attorneys for plaintiff. Mr. Thomas A. Costolow, Assistant United States District Attorney, for defendant.

Before MERRILL E. OTIS, District Judge.

(QUESTION)

THE COURT: The question which this case presents is essentially a question of fact. The plaintiff sold automobile connecting rods. The tax which was imposed, a refund of which the plaintiff seeks in this case, was imposed upon the theory that the plaintiff manufactured the connecting rods which it sold. If it did manufacture them, it was properly taxed. It did no more than sell connecting rods which it had not manufactured but had only repaired, it was improperly taxed. The question then is, was that which the plaintiff did the manufacture of connecting rods or only the repair of connecting rods?

To my mind this question of fact seems most simple and most easy to answer. Perhaps its apparent simplicity covers up greater difficulties than I observe.

(Repair v. Manufacture)

Learned counsel for the defendant concedes that if an individual were to take a connecting rod from his automobile, part of which was so worn that it was no longer serviceable until it was repaired, that if the person in the shop to which he took this connecting rod did exactly what the plaintiff did with the connecting rods on which the plaintiff worked, learned counsel for the defendant concedes that would be no more than a repair of the connecting rod, and that if that was the business in which the plaintiff was engaged, it was not subject to this tax that was imposed in this case. I think counsel for the defendant is right in saying that what would have been done in that situation by the shop owner was only a repair of the connecting rod which had been brought to him. There can be no argument about that. That is too plain for argument.

The connecting rod is the same connecting rod after repairing is done as it was before. It has not lost its identity. Whether a given operation is manufacture or repair of something that already has been manufactured, does not depend upon what is done with the thing after it has been repaired or after it has been worked upon. It depends upon what has been done. If it is merely a repair operation if it is handed back to some other person who has brought it for the purpose of having it repaired, it is still nothing but a repair operation if, after the work has been done, it is laid upon the shelf and sold the next day or the next week or the next year. In neither case is the identity of the thing lost.

(Identity Not Lost)

It seems to me that counsel for the defendant, as I indicated when he was arguing the matter, has confused a conception of a change of identity with a loss of marks of identification. If one takes a connecting rod and throws it into a pile of connecting rods in which there are 10,000 others, the mere fact that he can not again pick out that identical connecting rod which he threw into the pile of connecting rods because it has no marks upon it by which it can be identified, does not mean that its identity has been lost. Its identity has not been lost; it is still the same connecting rod that it was when it was thrown into the pile of connecting rods. That is true as to each of the connecting rods upon which the plaintiff did some work. Each of them was a connecting rod before the work was begun, and after the work, which made the connecting rod again useful and serviceable, was finished—it was the same connecting rod that it was before. Its identity had not been lost and had not been changed.

(Conclusion)

I am not able to reach any other conclusion than that all the plaintiff did was the repair of connecting rods and not the manufacture of connecting rods.

I have read through the requested findings of fact and conclusions of law. They follow the stipulation of facts, with certain additional findings that the evidence here presented today supports. The conclusions of law requested are those which I have suggested in this short oral opinion. The requested findings of fact and conclusions of law are adopted by the Court. To each of the conclusions of law the defendant is allowed an exception.

(Which said findings of fact and conclusions of law so adopted by the Court are in words and figures as follows:)

FINDINGS OF FACT

1. The plaintiff, Hempy-Cooper Manufacturing Company, is, and at all times involved in this suit was, a corporation duly organized and existing under and by virtue of the laws of the State of Missouri, with its principal office and place of business in Kansas City, Jackson County, Missouri.

2. Prior to the 25th day of February, 1936, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department and the Collector of Internal Revenue for the 6th District of Missouri, determined that there were due from the plaintiff, pursuant to the provisions of paragraph (c) of Section 606 of the Revenue Act of 1932, certain excise taxes upon the sale by plaintiff of certain automobile parts or accessories, to-wit, connecting rods in the sum of $1,030.87; and pursuant to such determination the defendant assessed said taxes, or caused the same to be assessed, against the plaintiff, and the Collector of Internal Revenue for the 6th District of Missouri made demand upon plaintiff for the payment of said taxes, together with penalty and interest thereon in the sum of $190.78, making a total assessment of $1,221.65. The plaintiff, pursuant to said assessment and demand, paid to said Collector of Internal Revenue for the 6th District of Missouri, the aforesaid sum of $1,221.65, on the 25th day of February, 1936.

3. Thereafter, and prior to the 20th day of June, 1936, the defendant acting by and through the Bureau of Internal Revenue of the Treasury Department and the Collector of Internal Revenue for the 6th District of Mis-

souri, determined that there were due from the plaintiff, pursuant to the provisions of paragraph (c) of Section 606 of the Revenue Act of 1932, certain excise taxes upon the sale by plaintiff of certain automobile parts or accessories, to-wit, connecting rods, in the sum of $360.07; and pursuant to such determination the defendant assessed said taxes, or caused the same to be assessed, against the plaintiff, and the Collector of Internal Revenue for the 6th District of Missouri made demand upon plaintiff for the payment of said taxes, together with penalty and interest thereon in the sum of $36.87, making a total assessment of $396.94. The plaintiff, pursuant to said assessment and demand, paid to said Collector of Internal Revenue for the 6th District of Missouri the aforesaid sum of $396.94, on the 20th day of June, 1936.

4. The excise taxes so assessed against and collected from, the plaintiff, as set forth in the preceding paragraphs numbered 2 and 3 hereof, were in respect of sales of certain automobile parts or accessories, to-wit, connecting rods, made by plaintiff during the period beginning with the month of June, 1932, and ending with the month of March, 1936.

5. The Collector of Internal Revenue for the 6th District of Missouri paid and remitted to the defendant said excise taxes and penalty and interest thereon so assessed against and collected from, the plaintiff, as aforesaid, and the defendant received and still retains the same.

6. On the 20th day of July, 1936, the plaintiff filed with the Collector of Internal Revenue for the 6th District of Missouri its claim for refund of the aforesaid excise taxes and penalty and interest thereon, assessed against, and collected from the plaintiff as hereinbefore set forth, in the aggregate amount of $1,618.59. Said

claim was made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States and was so filed within four years after the date of payment of said taxes, and said claim set forth the reasons for, and the grounds supporting, the refund of said taxes.

7. Thereafter, and on the 30th day of October, 1936, the Hon. Guy T. Helvering, Commissioner of Internal Revenue of the United States, acting by and through the Hon. D. S. Bliss, Deputy Commissioner of Internal Revenue, rejected and disallowed said claim for refund, and notified the plaintiff of such rejection and disallowance by letter signed by said Deputy Commissioner, dated the 30th day of October, 1936, and sent to plaintiff by registered mail.

8. The plaintiff did not include the aforesaid excise taxes in the price of the articles with respect to which said taxes were imposed; and plaintiff did not collect the amount of said taxes, or any part thereof, from the vendee or vendees of the articles in respect of which said taxes were imposed. The burden of said taxes was borne solely and exclusively by the plaintiff, and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees.

9. All of the aforesaid excise taxes were assessed and imposed in respect of sales by plaintiff of rebabbitted connecting rods. All of said connecting rods were originally manufactured by persons, firms or corporations other than plaintiff and before their acquisition by plaintiff had been used as operating parts of automobile motors, and by reason of such use the babbit metal bearings constituting parts of said rods were worn, chipped, roughened and otherwise impaired.

10. Plaintiff imported none of said connecting rods in respect of which said excise taxes were assessed, but obtained all thereof from sources within the United States. At no time has plaintiff imported, nor does it now import, any automobile parts or accessories whatsoever.

11. The rebabbitting process to which the above mentioned used and second-hand connecting rods were subjected in plaintiff's shop consisted of melting and removing therefrom the old, worn, babbit metal bearings and of casting therein new babbit metal bearings and grinding, polishing and grooving the same so as to make said rods again suitable for use as operating parts of automobile motors.

12. The babbitt metal bearings contained in the connecting rods involved in this suit were of inconsequential size and bulk compared with the total size and bulk of the connecting rods.

13. The connecting rods which were rebabbitted by plaintiff, and in respect of which the excise taxes involved in this suit were imposed, did not lose their identity as connecting rods during, or as a result of, the rebabbitting process in plaintiff's shop.

14. None of the identifying symbols, trade-marks, numbers or other identifying data appearing on said connecting rods were removed, marred or obliterated during, or as a result of, the rebabbitting process in plaintiff's shop, but on the contrary, all such identifying numbers and data were left intact.

15. A rebabbitted connecting rod is a second-hand connecting rod; and all of the connecting rods which were rebabbitted by plaintiff, and in respect of which the

taxes involved in this case were imposed, were second-hand connecting rods when sold by plaintiff after the same were rebabbitted.

16. The arrangement under which plaintiff kept on hand and in stock a supply of rebabbitted connecting rods of various kinds and makes was a matter of convenience to the plaintiff and its customers so that the customers of plaintiff, by exchanging their rods, used rods for rebabbitted rods and paying a consideration in cash for the rebabbitting, could obtain prompt delivery of rebabbitted rods without waiting for the actual rebabbitting process to be completed upon the customers' own rods.

17. Rebabbitted connecting rods were widely known and used in the automobile industry for many years prior to the enactment of the Revenue Act of 1932, including Section 606 thereof, and there were many persons, firms and corporations in various parts of the United States engaged in the business of rebabbitting connecting rods at the time of enactment of the Revenue Act of 1932, and for many years prior thereto.

18. The rebabbitting process performed by plaintiff upon the connecting rods in respect of which the excise taxes involved in this case were imposed constituted the repair, rehabilitation or reconditioning of used and second-hand connecting rods, and did not constitute the manufacture or production of connecting rods.

19. The plaintiff at no time manufactured, produced, or imported any automobile parts or accessories whatsoever.

20. The sales of rebabbitted connecting rods in respect of which the excise taxes involved in this case were imposed did not constitute the sales of automobile parts or accessories by the manufacturer, producer or importer.

Conclusions of Law

1. The plaintiff has complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

2. The plaintiff is not, and was not during the times involved in this suit, the manufacturer, producer or importer of automobile connecting rods or of any automobile parts or accessories whatsoever within the meaning of Section 606 of the Revenue Act of 1932.

3. The tax imposed by Section 606 (c) of the Revenue Act of 1932 applies only to sales of automobile parts or accessories when sold by the manufacturer, producer or importer.

4. The excise tax imposed by Section 606 (c) of the Revenue Act of 1932 does not apply to sales of rebabbitted automobile connecting rods by one who acquires such rods second-hand and rebabbits the same, and who neither manufactures, produces nor imports any other automobile parts or accessories.

5. In holding and determining that the tax imposed by Section 606 (c) of the Revenue Act of 1932 applied to sales of rebabbitted connecting rods by plaintiff during the period beginning with the month of June, 1932, and ending with the month of March, 1936, the Commissioner of Internal Revenue has exceeded the authority granted him under the Internal Revenue Act of 1932.

6. Under the evidence and the law the plaintiff is entitled to judgment against defendant in the sum of $1,618.59.

7. The plaintiff is not entitled to recover interest on said sum of $1,618.59.

Judgment for the plaintiff, the formal judgment entry may be submitted for approval and entry.

(Reprinted from Commerce Clearing House, 1938 Standard Federal Tax Service, Vol. 4 ¶9530.)

A. P. Bardet and E. Bardet, Co-partners, Doing Business as the Pioneer Motor Bearing Co., Plaintiffs, v. United States of America, Defendant.

Southern Division of the District Court of the United States for the Northern District of California. No. 20364-L. Decided May 18, 1938.

Excise tax on automobile parts.—The excise tax imposed by Section 606 (c) of the 1932 Act does not apply to sales of rebabbitted automobile connecting rods by one who acquires such rods second-hand and rebabbits the same, and who neither manufactures, produces, nor imports any other automobile parts or accessories.

See Reg. 46, Art. 41 at 393 CCH ¶2614.176.

LOUDERBACK, J.: The above entitled cause came on regularly for trial before the above entitled Court, Honorable Harold Louderback presiding therein, sitting without a jury.

Plaintiffs appeared in person and by their attorneys, A. E. Graupner and Theodore L. Breslaure, and the defendant appeared by its attorney, Frank J. Hennessy, United States Attorney, being represented by Esther B. Phillips, Deputy United States Attorney.

Witnesses were sworn and testimony given at the said hearing, and the Court being fully advised in the facts and the law, makes its Findings of Fact as follows:

FINDINGS OF FACT

Finds that all the allegations of plaintiff's complaint are true:

Finds that all the allegations of paragraph I and all the allegations of paragraph III except the sentence beginning on line 28 of page 2 of defendant's Answer, and all the allegations in paragraphs V and VI of defendant's Answer are untrue; and more particularly,

The Court finds that the plaintiffs, A. P. Bardet and E. Bardet, were and are at all the times involved in this action, co-partners.

Prior to the 14th day of April, 1937, the defendant, acting by and through the Bureau of Internal Revenue of the Treasury Department and the Collector of Internal Revenue for the First District of California, determined that there was due from the plaintiffs, pursuant to the provisions of Paragraph C of Section 606 of the Revenue Act of 1932, certain excise taxes upon the sale by plaintiffs of certain automobile parts or accessories, to-wit: connecting rods, in the sum of One Thousand Nine Hundred Twenty-nine and 61/100 Dollars ($1929.61); and pursuant to such determination, defendant assessed said taxes, or caused the same to be assessed against the plaintiffs; and the Collector of Internal Revenue for the First District of California made demand upon plaintiffs for the payment of said taxes together with a penalty in the sum of Ninety-six and 48/100 Dollars ($96.48) and interest in the sum of Forty-four and 61/100 Dollars ($44.61), the total demand aggregating the sum of Two Thousand Seventy and 70/100 Dollars ($2070.70); plaintiffs, pursuant to said assessment and demand, paid to said Collector of Internal Revenue for the First District

of California the aforesaid sum of Two Thousand Seventy and 70/100 Dollars ($2070.70) on the 14th day of April, 1937.

The excise taxes so assessed against, and collected from the plaintiffs, as set forth in the preceding paragraphs, were in respect of sales of certain automobile parts or accessories, to-wit, connecting rods, made by plaintiffs during the period from June, 1932 to July, 1936.

The Collector of Internal Revenue for the First District of California paid and remitted to the defendant said excise taxes and penalty and interest thereon so assessed against, and collected from the plaintiffs as aforesaid, and the defendant received and still retains the same.

On the 7th day of May, 1937, plaintiffs filed with the Collector of Internal Revenue for the First District of California, their claim for refund of the aforesaid excise taxes and penalty and interest thereon, assessed against, and collected from the plaintiffs as hereinbefore set forth, in the aggregate amount of Two Thousand Seventy and 70/100 Dollars ($2070.70). Said claim was made and duly filed upon the official form prescribed therefor by the Treasury Department of the United States and was so filed within four years after the date of payment of said taxes, and said claim set forth the reasons for, and the grounds supporting, the refund of said taxes.

Thereafter, and on or about the 23rd day of October, 1937, the Hon. Guy T. Helvering, Commissioner of Internal Revenue of the United States, acting by and through the Hon. D. S. Bliss, Deputy Commissioner of Internal Revenue, rejected and disallowed said claim for refund, and notified the plaintiffs of such rejection and disallowance by letter signed by said Deputy Commissioner, dated

the 23rd day of October, 1937, and which was received by the plaintiffs on or about the 27th day of October, 1937.

The plaintiffs did not include the aforesaid excise taxes in the price of the articles with respect to which said taxes were imposed; and plaintiffs did not collect the amount of said taxes, or any part thereof, from the vendee or vendees of the articles in respect of which said taxes were imposed. The burden of said taxes was borne solely and exclusively by the plaintiffs and the burden of none of said taxes was passed on by the plaintiff to its customers or vendees.

All of the aforesaid excise taxes were assessed and imposed in respect of sales by plaintiffs of rebabbitted connecting rods. All of said connecting rods were originally manufactured by persons, firms or corporations other than plaintiffs and before their acquisition by plaintiffs had been used as operating parts of automobile motors, and by reason of such use the babbitt metal bearings constituting parts of said rods were worn, chipped, roughened and otherwise impaired.

Plaintiffs imported none of said connecting rods in respect of which said excise taxes were assessed, but obtained all thereof from sources within the United States. At no time have plaintiffs imported, nor do they now import, any automobile parts or accessories whatsoever.

The rebabbitting process to which the above mentioned used and second-hand connecting rods were subjected in plaintiffs' shop consisted of melting and removing therefrom the old, worn, babbitt metal bearings and of casting therein new babbitt metal bearings and grinding, polishing and grooving the same so as to make said rods again suitable for use as operating parts of automobile motors.

The babbitt metal bearings contained in the connecting rods involved in this suit were of inconsequential size and bulk compared with the total size and bulk of the connecting rods.

The connecting rods which were rebabbitted by plaintiffs, and in respect of which the excise taxes involved in this suit were imposed, did not lose their identity as connecting rods during, or as a result of, the rebabbitting process in plaintiffs' shop.

None of the identifying symbols, trade-marks, numbers or other identifying data appearing on said connecting rods was moved, marred or obliterated during, or as a result of, the rebabbitting process in plaintiffs' shop, but on the contrary, all such identifying numbers and data were left intact.

A rebabbitted connecting rod is a second-hand connecting rod; and all of the connecting rods which were rebabbitted by plaintiff, and in respect of which the taxes involved in this case were imposed, were second-hand connecting rods when sold by plaintiffs after the same were rebabbitted.

The arrangement under which plaintiffs kept on hand and in stock a supply of rebabbitted connecting rods of various kinds and makes was a matter of convenience to the plaintiffs and their customers so that the customers of plaintiffs, by exchanging their old, used rods for rebabbitted rods and paying a consideration in cash for the rebabbitting, could obtain prompt delivery of rebabbitted rods without waiting for the actual rebabbitting process to be completed upon the customers' own rods.

Rebabbitted connecting rods were widely known and used in the automobile industry for many years prior to the enactment of the Revenue Act of 1932, including Section 606 thereof, and there were many persons, firms and corporations in various parts of the United States engaged in the business of rebabbitting connecting rods at the time of enactment of the Revenue Act of 1932, and for many years prior thereto.

The rebabbitting process performed by plaintiffs upon the connecting rods in respect of which the excise taxes involved in this case were imposed constituted the repair, rehabilitation or reconditioning of used and second-hand connecting rods, and did not constitute the manufacture or production of connecting rods.

The plaintiff at no time manufactured, produced, or imported any automobile parts or accessories whatsoever.

The sales of rebabbitted connecting rods in respect of which the excise taxes involved in this case were imposed did not constitute the sales of automobile parts or accessories by the manufacturer, producer or importer.

Conclusions of Law

From the foregoing Findings of Fact, the Court makes its Conclusions of Law as follows:

The plaintiffs have complied with all statutory conditions constituting conditions precedent to the institution and maintenance of this suit.

The plaintiffs are not, and were not during the times involved in this suit, the manufacturer, producer or im-

porter of automobile connecting rods or of any automobile parts or accessories whatsoever within the meaning of Section 606 of the Revenue Act of 1932.

The tax imposed by Section 606 (c) of the Revenue Act of 1932 applies only to sales of automobile parts or accessories when sold by the manufacturer, producer or importer.

(Tax Not Applicable)

The excise tax imposed by Section 606 (c) of the Revenue Act of 1932 does not apply to sales of rebabbitted automobile connecting rods by one who acquires such rods second-hand and rebabbits the same, and who neither manufactures, produces nor imports any other automobile parts or accessories.

In holding and determining that the tax imposed by Section 606 (c) of the Revenue Act of 1932 applied to sales of rebabbitted connecting rods by plaintiffs during the period from June, 1932, to July, 1936, the Commissioner of Internal Revenue has exceeded the authority granted him under the Internal Revenue Act of 1932.

Under the evidence and the law the plaintiffs are entitled to judgment against defendant in the sum of Two Thousand Seventy and 70/100 Dollars ($2070.70) together with interest thereon from the 14th day of April, 1937, at the rate of six per cent (6%) per annum.

Let judgment be entered in accordance with the above Findings and Conclusions.

(Reprinted from Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, ¶9259)

Leo G. Becker and Fred Florence, doing business as the Becker-Florence Electric Company, Plaintiff, v. United States of America, Defendant.

District Court of the United States for the Western Division, Western District of Missouri. No. 9859. Decided December 27, 1938.

Excise tax on auto parts: Reconditioned generators and armatures.—Excise tax on sales by the manufacturer of automobile parts and accessories is not incurred where petitioners acquired used generators and armatures from automobile owners or from garages and repair shops, reconditioned them and sold them to automobile owners and repair shops, keeping a stock of them on hand so that the car owner would not be delayed while his generator was being repaired.

See Reg. 46, Art. 41 at 393 CCH ¶2614.023.

L. V. Copley, 29 Dierks Bldg., Kansas City, Mo., for the plaintiff. Thomas A. Costolow, Assistant U. S. Attorney, James W. Morris, Assistant Attorney General, Federal Bldg., Kansas City, Mo., for the defendant.

MEMORANDUM OPINION

REEVES, D. J.: This is a suit for refund of taxes paid to the United States Collector of Internal Revenue and remitted by him to the treasury of the government.

The taxes were imposed for a period extending between June, 1932 and May, 1935. The government authorities deemed the imposition of the tax as proper under paragraph (c) of Section 606 of the Revenue Act of 1932. Applicable portions of the section are as follows:

There is hereby imposed upon the following articles sold by the manufacturer, producer, * * * a tax equivalent to the following percentages of the price, for which so sold * * * (c) parts or accessories * * * for any of the articles enumerated in subsection (a) or (b), 2 per centum.

(Who Is a Manufacturer?)

It was the contention of the government that the plaintiffs were the manufacturers and producers of generators and armatures for use in automobiles and being accessories within the purview of the statute.

On the other hand it is contended by the plaintiffs that the generators and armatures sold by it were merely reconditioned or repaired generators and armatures acquired by it either from automobile owners or from garage owners and repair shops where such generators and armatures had been abandoned because defective from wear and tear in use. The plaintiffs say that such generators and armatures became and were second-hand accessories. It was the evidence that the plaintiffs not only repaired generators and armatures for automobile owners, but that the principal part of their business was the acquisition of worn and defective generators and armatures, and the sale thereof, after having been reconditioned and repaired, to automobile owners and garages. It was a convenience, according to the testimony, to have a generator and an armature at hand to replace a defective or useless one so that the car owner would not be delayed while his generator was being repaired. As aptly stated by counsel, the sole question for decision is whether the plaintiffs should be classed as manufacturers and producers of such generators and armatures so as to justify the imposition of the tax.

Other facts will be stated in the course of this memorandum opinion.

1. As a postulate or premise to a proper decision of the case it should be kept in mind that the language of the statute should not be extended by interpretation beyond its clear import, and that the burdens of a tax should not be increased by implication or inference from the provisions of the statute. Bankers Trust Co. v. Frank K. Bowers, 295 F. 89 (1 USTC ¶87).

2. The Congress, in seeking to provide for an equitable and just application of the tax, specifically provided that, in cases where the manufacturer of automobile accessories sold its product to the manufacturer of automobiles to be used as accessories thereon, the tax was levied upon the vendee and not upon the manufacturer. And for the purpose of the section, "the vendee shall be considered the manufacturer or producer of the parts or accessories so resold."

The statute did not provide a special meaning for the words "manufacturer" and "producer". It is obvious from the provisions just mentioned that it was the object of the Congress to use the words "manufacturer" and "producer" in their recognized and ordinarily accepted meaning. One is confirmed in this conviction by the fact that the Congress, in imposing a tax on other articles of manufacture, specifically took the word "manufacture" out of the usual significance of the word and gave it a special and an unusual meaning. For instance, by Section 710, Title 26 USCA, a manufacturer of tobacco is defined to be:

Every person whose business it is to manufacture tobacco or snuff for himself, or who employs others to manufacture tobacco or snuff, whether such manufacture

be by cutting, pressing, grinding, crushing, or rubbing of any raw or leaf tobacco, or otherwise preparing raw or leaf tobacco, or manufactured or partially manufactured tobacco or snuff, or the putting up for use or consumption of scraps, waste, clippings, stems, or deposits of tobacco resulting from any process of handling tobacco, or by the working or preparation of leaf tobacco, tobacco stems, scraps, clippings, or waste, by sifting, twisting, screening, or any other process, shall be regarded as a manufacturer of tobacco.

It was obvious from this enactment that the Congress intended to extend the meaning of "manufacture" beyond that as usually understood and accepted. The Congress did the same thing by Section 972, Title 26 USCA, where a manufacturer was defined to be:

Every person who manufactures oleomargarine for sale shall be deemed a manufacturer of oleomargarine. And any person that sells, vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table without compensation, who shall add to or mix with such oleomargarine any substance which causes such oleomargarine to be yellow in color, determined as provided in paragraph 2 of Section 971 (a), shall also be held to be a manufacturer of oleomargarine within the meaning of this chapter.

By reason of the fact that the Congress in dealing with the same subject, that is Internal Revenue, found it necessary to give to the words under discussion a special meaning in some cases would carry the implication that the use of the words, in the absence of such special definitions, would be understood in the ordinary and usual sense.

(Cases Compared)

3. In the case of Friday v. Hall and Kaul Co., 216 U. S. 449, the Supreme Court of the United States reversed the Third Circuit Court of Appeals, 158 F. 593, where a question arose on a proper interpretation of the word "manufacturing" as used in Bankruptcy Law. Unhappily, the Court of Appeals had held that the production of concrete arches, etc., was not manufacturing within the purview of the bankruptcy law. The Supreme Court said it was. At p. 454, the Supreme Court said that "manufacturing has no technical meaning." Yet it quoted approvingly the language of Mr. Justice Field in Kidd v. Pearson, 128 U. S. 1, l. c. 20, where it said that:

"Manufacture is transformation, the fashioning of raw materials into a change of form for use."

The court then adverted to the case of Tide Water Oil Company v. United States, 171 U. S. 210, l. c. 216, and approved the meaning of the word "manufacturing" as there used as follows:

Mr. Justice Brown, referring to the expansion of the meaning of the word "manufacture", said that "the word is now ordinarily used to denote an article upon the material of which labor has been expended to make the finished product."

In the same opinion the court also approved an opinion of the Eighth Circuit, styled In re First National Bank, 152 F. 64, wherein the late Judge Walter H. Sanborn defined manufacturing as follows:

Its ordinary significance is producing a new article of use * * * by the application of skill and labor to the raw materials of which it is composed.

A case having many features similar to the case now being considered is that of Cate v. Connell, 173 Fed. 445, l. c. 447, where the court said:

We do not think that the repairing of automobiles * * * can fairly be described as a manufacturing pursuit. It seems to have been chiefly, if not altogether, the adjustment of automobile parts bought from other persons, to existing automobiles.

Corpus Juris defines manufacture as "anything made from raw materials by the hand, by machinery, or by art." 38 C. J. Section 4, 966.

As a verb it is defined to mean:

To change and modify natural substances so that they become articles of value and use. 38 C. J. Section 5, p. 966.

In Words and Phrases, Vol. 4, p. 273, manufacturing is distinguished from repairing. It is there said:

* * * for "manufacturing" is the system of industry which produces manufactured articles, and "manufacture" is the production of articles for use from raw or prepared materials, by giving them new forms, qualities, and properties, or combinations, and "repairing" is the making or restoring of an article or thing to its completeness.

The case cited in support of this distinction was State v. Newman Lumber Co., 59 South, 923, l. c. 926; 102 Miss. 802.

(Repair v. Manufacture)

4. In this case the plaintiffs acquired by purchase or exchange all worn and defective generators and armatures and by a process of cleaning, repairing and supplying new parts, the generators and armatures were restored and reconditioned for further use.

As thus repaired and reconditioned the devices were sold, sometimes in quantities. Under the taxing law under observation the original manufacturer paid a tax on the devices unless sold to the manufacturer of a motor vehicle in which they were to be used, in which case a tax was paid on the fully equipped motor vehicle. If sold as an accessory by the manufacturer a tax was paid as required by statute but this was all of the manfacturer's tax.

To give the statute the meaning contended for by the government would involve endless complications as affecting dealers, garage owners and repair men in general. No definite line could well be drawn and twilight ones would develop so frequently and from so many angles that a just and fair and practicable enforcement of the law would become impossible.

It seems obvious that the Congress never intended that the tax should be applied as in this case. Accordingly the plaintiffs are entitled to have judgment for a return of the tax required of them. An appropriate journal entry to this end will be prepared and submitted by counsel for the plaintiffs.

(Reprinted from Commerce Clearing House, 1939 Standard Federal Tax Service, Vol. 4, Paragraph 9219.)

Clawson and Bals, Inc., a corporation, v. Carter H. Harrison, Collector of Internal Revenue in and for the First District of Illinois.

United States District Court, Northern District of Illinois, Law 47068. Decided November 26, 1938.

FINDINGS OF FACT

1. Plaintiff, Clawson & Bals, Inc., is a corporation duly organized and existing under the laws of Illinois and, during the times herein mentioned, had its principal office and place of business in the City of Chicago, State of Illinois, and within the Northern District of Illinois and the Eastern Division thereof.

2. The defendant, Carter H. Harrison, was appointed Collector of Internal Revenue in and for the First District of Illinois, on August 21, 1933, and has been such Collector of Internal Revenue at all times subsequent thereto, and is a citizen, resident and inhabitant of the Northern District of Illinois.

3. Plaintiff was incorporated April 17, 1925, and its purpose, among others, was "to manufacture, buy, sell, export and import, deal in and deal with, all kinds of automobile and automobile accessories, and any and all other articles, incident to automobiles". Its principal business, however, has been to make automobile connecting rods and sell them throughout the world to wholesalers, known also as jobbers, for replacement purposes in connection with the repairing by garagemen and mechanics of automobile motors. It made such connecting rods from new forgings, or castings, as well as from

forgings or castings or worn-out and discarded connecting rods.

4. Prior to and since June 21, 1932, plaintiff operated seven plants or factories, namely, a large one in Chicago, and six smaller ones in Moline, Illinois, Minneapolis, Detroit, New York City, Atlanta and Dallas, for the making of connecting rods. It maintained warehouses in divers cities from which it distributed its product and had points of distribution in other cities. It employed salesmen and engaged manufacturers' representatives for the distribution of its products.

5. Plaintiff has one hundred employees engaged in the production of connecting rods, of which forty are employed in the Chicago plant and sixty in the other six plants. Its plant equipment includes, among other things, lathes, drill presses, broaching machines, boring jigs, babbitt pots, emery wheels, special molds and babbitting machines, which were used in the production of the connecting rods in question.

6. Plaintiff produced and maintained a stock of more than five hundred different types of connecting rods, assigned to each type a stock number of its own, such as CB1, CB2, down to CB524, covering all makes of automobiles. All of plaintiff's connecting rods were designated and known to the trade by the trade names, "C & B Rods", and were sold under such trade name. Plaintiff advertised in the leading trade journals and publications and was listed in the Chicago classified telephone directories under the classification of Automobile Parts—Manufacturers. It was also a member of the Manufacturers Division of the National Standard Parts Association, a trade association.

7. The connecting rod is the means of transmitting power generated by discharge in the cylinder, in the piston head, to the crank shaft by being attached to the crank pin. In the large end of the connecting rod there is a babbitt bearing known as the crank shaft bearing. The babbitt bearing is within the parts of the rod known as the cap and shank, which are held together by two bolts and nuts. The other, or smaller end of the rod, is known as the wrist pin end. At least half of the rods produced by plaintiff during the taxable period had bronze bushings in the wrist pin end. The bushings are also bearings and are just as important and just as necessary as the babbitt bearing at the large end. The one bearing cannot work successfully without the other.

8. During the taxable period, June 21, 1932, to June 30, 1936, plaintiff's total sales of automobile connecting rods aggregated $4,355,752.50. All such sales were of connecting rods manufactured and produced by plaintiff, as hereinafter set forth, both from new castings or forgings which plaintiff purchased and machined as well as from worn-out and discarded connecting rods which plaintiff obtained either from "junkies", or from jobbers who turned them in as part payment on purchases from plaintiff on what is known in the trade as the exchange basis for replacement parts. A "Junkie" is a man who goes to garages, automobile wreckers, and elsewhere where he can procure used and discarded parts which he thereafter sells to plaintiff and others. None of the used, worn-out and discarded connecting rods had any commercial value as automobile parts because they were no longer fit for use. They were scrap and had only a junk or scrap value when acquired by plaintiff and, although such scrap was recognized as having once been

connecting rods, a manufacturing process was necessary in order to make a new and serviceable product. Plaintiff carried on that manufacturing process. The scrap material was dismantled and prepared for the manufacturing process; it was combined with new materials, put through grinding operations, machining operations, there was an assembling and combining of all materials, together with workmanship, and the employment of skill before plaintiff's marketable article was produced. The completed article as manufactured and produced by plaintiff had a value relatively much greater than that of the worn-out article in its scrap condition. In other words, plaintiff manufactured and produced connecting rods from scrap.

9. The following is a summary of plaintiff's processes and operations in the manufacture and production of connecting rods from scrap:

The worn-out, unusable and discarded rods came to plaintiff in packages, boxes and bags. Plaintiff opened and checked them against the shipping ticket; they were thrown on a table and sorted out according to their particular makes and numbers. At least during the period December, 1934, and for at least five or six months in 1935, plaintiff ground off of all worn-out rods originally made by General Motors Corporation and its subsidiaries, the trade names and other marks of identification pursuant to an agreement with General Motors.

The forgings went into the babbitt room where the two bolts and nuts were taken out and the cap and shank separated. Some bolts and nuts were salvaged, others were junked. The shank and cap were separately placed in a melting pot and all old babbitt metal and what remained of the original babbitt bearing was rewound. The

old babbitt was sold as salvage. Plaintiff used entirely new babbit in all of its babbitting processes. The babbitt metal consisted of 89% tin, 3.7% copper, and 7.3% antimony. A flux was then applied to prepare the cap and rod for a coating of tin to act as a bond and make the new babbitt metal stick so as to become part of the steel forging. After applying the flux, the arm (shank) and cap were separately dipped into a pot containing molten tin. The tin coating was necessary in order to band the steel forging and babbitt together. The cap and arm are separately put into a machine with the proper size mold, between which mold and the cap on the one hand and the mold and the arm on the other, a man poured new molten babbitt metal. The two parts were then removed from the machine and permitted to cool. The newly poured babbit extended beyond each side of what was to become the babbitt bearing. Before the cap and arm were assembled, each was subjected to lathing operation and the protruding babbitt was thereby cut away so as to leave an even surface and permit the two parts to fit together and make a circle when assembled. Then the cap and arm were assembled by putting in new shims (if it was the type of rod which required shims) and bolts and nuts. The rod and cap were placed upon a machine which turned and tightened each of the nuts.

The inside of the new babbit bearing was rough bored on a machine to approximately 10/1000ths smaller than what was to become the finished diameter. Then the cutters were changed and a broaching operation occurred whereby the babbitt bearing was further cut, grooved, and channels were cut on the inside of the babbitt bearing for oiling purposes, and it was drilled through, where necessary, in order to connect with the oil holes in the

steel forging or casting. In a further and final broaching operation the babbitt bearing was cut, that is, machined, to the prescribed diameter. The assembled rod was then placed on a pressing machine and a new bronze bushing placed above the old bushing and, under pressure, the old one was forced out and the new one was forced in. In the case of connecting rods for Fords, a further machine operation was required by which the bushing was completely severed and grooved on the inside. All of the rods were then checked for alignment and twist in order that they would leave plaintiff's plant as a perfect rod. Each was placed in a vertical position upon a jig machine, part of which went through the opening in the wrist pin end and another part through the opening at the crank shaft end. The indicator would show just how much it was out of line and the necessary adjustments then were made. At least half of the rods made by plaintiff were the type that required bushings. After the rod had been aligned, it would go to a bench where a man inspected it and if there were any pieces of babbitt hanging on the sides, he would take them off and clean the rod wherever necessary. The rod was carefully inspected for blow holes, which occurred now and then, and was given such inspection as was necessary to insure a product as perfect as modern machinery can produce. The rods were then placed in a machine where they were covered with grease. After being greased, they were taken in the stock room and placed on shelves in separate bins containing plaintiff's part number, which numbers conformed to those used on plaintiff's price lists and catalog. The rods were boxed and labeled just before shipping. The boxes were labeled at both ends. The label contained a description of the contents, name of

the car which the rods would fit, the number or model, plaintiff's number, that is, CB-1, CB-2, as the case may be, together with plaintiff's name and a trade symbol consisting of the letters "C. & B." in a small solid circle. The same type of label was placed on the ends of all boxes in which plaintiff shipped connecting rods, whether they contained inside rods made entirely of virgin metal, or from worn-out rods, or a mixture of each.

10. Plaintiff kept but one stock with respect to each number and had but one outright price with respect to the rods, irrespective of whether they were produced from entirely new castings or from scrap, and regarded the article made from scrap as equivalent to any similar product made entirely with virgin metal. The rods made from scrap were in competition with similar products made entirely of virgin metal and were just as serviceable. They were held out for sale and sold on the same basis and under the same warranties as the connecting rods produced from entirely virgin forgings. In other words, plaintiff made no distinction between such connecting rods in the numbering, cataloging, selling, billing, advertising, shipping, labeling, pricing, marketing, quality, warranty, guarantee, or otherwise.

11. When new casting or forgings arrived at the babbitting place, they went through substantially the same routine, the same processes, operations, assembling and finishing as outlined in the immediately preceding paragraph with respect to the production by plaintiff of connecting rods from scrap, that is, from used or worn-out connecting rods. Whether new castings or scrap were used the operations commencing with the babbitting stage were handled by the same men and on the same machines. All of plaintiff's processes involved grinding operations,

machining operations, assembling and combining of materials, together with workmanship and the employment of skill before the connecting rod was completed.

12. Plaintiff filed monthly excise tax returns on all of its sales of connecting rods occurring during the period June 21, 1932 to June 30, 1936, inclusive, and reported a total tax of $42,606.10, which it paid in monthly amounts. Thereafter, the Commissioner of Internal Revenue determined that the aggregate tax due by plaintiff for the period June 21, 1932 to June 30, 1936, inclusive, was $87,115.05. Accordingly, additional assessments were duly made in the total further amount of $44,508.95 tax and $9,732.07 interest. The addition assessments were based upon the commissioner's finding that plaintiff did not report that portion of the sales price which was paid by an allowance made for a used or worn-out connecting rod or rods, in such of the sales transactions as did not involve all cash but consisted partly of cash and partly of such an allowance. On February 8, 1937, plaintiff paid to defendant as Collector of Internal Revenue, $48,142.52, and on March 18, 1937, paid the remaining $6,089.50.

13. On February 26, 1936, plaintiff filed a claim for the refund of $54,232.02, representing $44,508.95 of the foregoing tax assessments of $87,115.05 and $9,723.07 of interest so assessed and paid. The claim was predicated upon the ground that plaintiff was neither the manufacturer nor producer of the connecting rods on which the additional tax was based but that its process, "constituted only the repair", of used and second-hand connecting rods; also that it bore the burden of the tax. On March 30, 1938, the Commissioner of Internal Revenue rejected plaintiff's claim.

14. All of the automobile connecting rods manufactured, produced and sold by plaintiff during the taxable period June 21, 1932 to June 30, 1936, inclusive, as aforesaid, are automobile parts or accessories.

15. Plaintiff is and was the manufacturer and producer of all of the automobile connecting rods involved in this suit.

16. The allowance granted by plaintiff to customers who turned in used or worn-out connecting rods on account of purchases of plaintiff's connecting rods constituted parts of the total sales price.

Conclusions of Law

Upon the foregoing findings of fact the court makes and enters the following conclusions of law:

1. Plaintiff was and is a manufacturer and producer of automobile parts within the meaning of Section 606 of the Revenue Act of 1932.

2. Plaintiff was and is the manufacturer and producer of all of the automobile connecting rods sold by it and upon which the tax sought to be recovered was assessed against and collected from plaintiff.

3. The taxes assesssed against and paid by plaintiff under the provisions of Section 606 of the Revenue Act of 1932, were lawfully assessed and collected.

4. Under the law and the evidence, defendant is entitled to judgment of dismissal with costs.

To the making and holding of the foregoing findings and conclusions, the plaintiff objects and excepts.

(Reprinted from copy furnished by counsel for Moroloy Bearing Service of Oakland, Ltd., a corporation.)

Moroloy Bearing Service of Oakland, Ltd., a corporation, Plaintiff, v. United States of America, Defendant.

Southern Division of the District Court of the United States for the Northern District of California. No. 21308-W. Decided July 16, 1940.

MEMORANDUM OPINION

This is an action wherein the plaintiff seeks to recover from the defendant the sum of $1090.80 which it paid the defendant as excise tax under Section 606 (c) of the Revenue Act of 1932 upon the sale of rebabbitted connecting rods from 1933 to 1936.

The plaintiff now is and for a considerable time last past has been engaged in the business of rebabbitting connecting rods for the automobile trade generally in this state. When the rebabbitting of the connecting rods was finished, the connecting rods were delivered to the repairing jobber who in turn sold them to the garage or automobile repair man.

Plaintiff's right to recover herein depends upon whether the process of rebabbitting the connecting rods was one of manufacture or one of repair. If the former, the tax was properly imposed. If the process was one of repair only, then the tax was not owing and plaintiff may recover.

The evidence shows the connecting rods which plaintiff rebabbitted were in their original state manufactured by others, and only came into the hands of the plaintiff when certain parts of them became defective either from the burning out of the babbitt through friction while in operation, or through lack of proper lubrication, or on account of other causes.

In no manner did the evidence show the plaintiff manufactured the connecting rods themselves, but on the contrary, the evidence clearly showed that plaintiff was engaged in the repair and rehabilitation of connecting rods manufactured by others, when they became outworn and defective from use.

In Bouvier's Law Dictionary (Rawle's Revision, Unabridged) the words manufacture and repair, when used as verbs, are defined as follows:

Manufacture—To make or fabricate raw materials by hand, art, or machinery, and work into forms convenient for use.

Repair—To restore to a sound state after decay, injury, delapidation, or partial injury.

It would be just as logical to hold that a shoe cobbler was a manufacturer of shoes that were brought to him for repair because he nailed or sewed soles and heels on the shoes in the process of repairing them, as to hold that a mechanic was a manufacturer of connecting rods because he rehabilitated them. The process is a repair in the one case just as it is in the other. That plaintiff is repairing its own rods for sale whereas the shoe cobbler is repairing shoes for others is not significant. Whether or not a process is one of repair does not depend on the condition of the title to the repaired articles.

The court orders that judgment be entered in favor of the plaintiff in the sum of $1099.80, with interest thereon as provided by law.

Let findings of fact and conclusions of law, and judgment be prepared in accordance with the opinion of the court.

MARTIN I. WELSH,
United States District Judge.

In the District Court of the United States for the Southern District of California, Central Division.

J. Leslie Morris Company, Inc., plaintiff, vs. United States of America, defendant. No. 433-M Civil.

CONCLUSIONS OF THE COURT.

McCORMICK, District Judge:

When consideration is given to the irreconcilable conflict of federal court decisions upon the crucial factual issue in this action, *i. e.,* whether taxpayer in rebabbiting used and damaged connection rods of automobiles is a manufacturer or producer of such parts or accessories, it is indisputable that there is more than doubt as to the meaning of the terms "manufacturer" or "producer" in Section 606 of the Revenue Act 1932 and Subsection (c) thereof. 47 Stat. at Large, Part 1, pp. 261-262, Title 33 U. S. C. A., Sec. 606.

Under such a record doubts arising under the taxing statute should be resolved against the taxing agency and favorable to the taxpayer. Miller v. Nut Margarine Co., 284 U. S. 498, at page 508; Erskine v. United States, 9 Circuit, 1936, 84 F. (2d) 691.

It is only by straining the terms "manufacturer" and "producer" contained in the taxing statute under consideration from their usual, ordinary and normally understood meanings into all-inclusive situations that these terms of doubtful signification can be extended to a service station or processor such as plaintiff taxpayer, whose transactions under consideration in this cause are actually no more than repairing damaged used connecting rods of automobiles and charging for the repair job and service upon delivery of the customer's repaired rod or

of another rebabbited second-hand repaired rod. We think no such forced and omnibus meaning of the terms "manufacturer" or "producer" can be fairly attributed to Congress in order to subject the articles sold by the plaintiff to the tax under (c) of Section 606. There is nothing in the statute which intimates that such was the congressional intent. The decision of the District Court for the Northern District of California in A. P. Bardet et al., d. b. a. Pioneer Motor Bearing Co. v. United States, No. 20364L, decided May 18, 1938, 384 C. C. H. p. 10,589, where the taxpayers suing are competitors of the plaintiff who had engaged in a like process and business of rebabbiting connection rods of automobile engines, as the taxpayer, and who were held not to be manufacturers under the same statute as here involved, persuades us to conclude that the operations and practices shown by the record before us are neither manufacture nor production of automobile parts within the meaning of Subsection (c) of Section 606, Revenue Act 1932.

Our conclusions are also supported by the decision of the District Court (Mo., 1937) in Hempy-Cooper Mfg. Co. v. United States, 19 Am. Fed. Tax Reports 1313, and Con-Rod Exchange, Inc., v. Hendrickson (D. C., W. D. Wash., 1939), 28 F. Supp. 924. These cited tax cases involved rebabbited connecting rods of automobiles, and we think they present situations identical with the record before us in this action.

For the sake of uniformity, if for no other reason, taxpayers identically situated and doing precisely the same thing in relation to tax laws should be treated alike. Our inquiries and investigations have failed to disclose that the government has taken appeal in the cases referred to, and we are therefore justified in assuming that refunds

have been made to the respective taxpayers situated as is the plaintiff taxpayer in this action.

We are not unmindful of the decision of the Seventh Circuit Court of Appeals in Clawson & Bals, Inc., v. Harrison, Collector, 108 F. (2d) 991, reaching a contrary conclusion as to the meaning of the terms "manufacturer" and "producer" as applied to rebabbiting activities similar to those shown by the record before us. This decision by a federal appellate court is entitled to and has been given careful study and respectful consideration. We feel, however, that no adequate discussion is to be found in the opinion of the court, differentiating between the broad meaning of the terms in matters of general concern and those relating specifically to tax laws. Such a distinction is supported by eminent authority, and we believe it must be regarded in ascertaining the meaning of tax legislation where the taxing statute itself does not clearly define the meaning of terms contained in it. See Hartramft v. Wiegman, 121 U. S. 609; Kuenzle v. Collector, etc., 32 Philippine 516, and Heacock Co. v. Collector, etc., 37 Philippine 979.

We think the rule of *stare decisis* is not applicable to the decision of the learned Court of Appeals of the Seventh Circuit. See Continental Securities Co. v. Interborough R. T. Co., 165 F. 945, at p. 960.

Inasmuch as our Circuit Court of Appeals has not considered or decided the question under consideration in this section, we are justified in formulating and reaching our own conclusions under the record before us and in the light of other identical situations considered and determined uniformly by the federal courts of the Ninth Circuit. Accordingly, as the plaintiff taxpayer has not passed on the tax to the customer or to anyone, it is

entitled to recover the amount illegally collected, and the government is not entitled to anything under its counterclaim.

Findings and judgment are ordered for the plaintiff and against the defendant as prayed under the issues of complaint, answer and counterclaim.

Dated this July 24, 1940.

Parts and Accessories.

Section 606(c) of the Revenue Act of 1932.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold:

(c) Parts or accessories (other than tires and inner tubes) for any of the articles enumerated in subsections (a) or (b), 2 per centum. For the purposes of this subsection and subsections (a) and (b), spark plugs, storage batteries, leaf springs, coils, timers, and tire chains, which are suitable for use on or in connection with, or as component parts of, any of the articles enumerated in subsections (a) or (b), shall be considered parts or accessories for such articles, whether or not primarily adapted for such use. This subsection shall not apply to chassis or bodies for automobile trucks or other automobiles. * * *.

Internal Revenue Bulletin, Cumulative Bulletin X1-2. page 473.

REGULATIONS 46, ARTICLE 41:

Definitions of parts or accessories.

XI-47-5873 S. T. 573.

Taxability of various articles as automobile parts or accessories.

Advice is requested with respect to the taxability of several articles used in connection with automobiles, etc., under Section 606 of the Revenue Act of 1932. * * *

The tax also attaches to rebabbited connecting rods and reclaimed brake drums in which new steel bands have been inlaid where they are placed in stock to be sold as parts and accessories. However, where these articles are reconditioned in connection with an immediate repair job the tax does not attach.

Internal Revenue Bulletin, Cumulative Bulletin X1-2, page 476.

REGULATIONS 46, ARTICLE 41:

Definition of parts or accessories.

XI-51-5937 S. T. 606.

Taxability of taximeters.

Advice is requested relative to the taxability of taximeters under Section 606(c) of the Revenue Act of 1932.

Taximeters are automobile accessories and are taxable under Section 606(c) of the Revenue Act of 1932. Small parts used in taximeters, such as bushings, pins, levers, and gears, which are commercial commodities not specially

designed for use in taximeters, are not taxable when sold separately.

No tax is due upon the sale of rebuilt or second-hand taximeters under Section 606(c) of the Revenue Act of 1932, provided they are not rebuilt or refinished to the extent that they lose their original identity.

Where a taximeter is repossessed by the manufacturer for nonpayment of the purchase price and the sale rescinded, the tax will attach to the price at which the article is resold by the manufacturer, but if a tax was paid on the first transaction, a credit or refund may be claimed in the amount of that part of the tax paid which is proportionate to the part of the sale price which is refunded or credited to the first purchaser.

Internal Revenue Bulletin, Cumulative Bulletin X11-1, page 384.

REGULATIONS 46, ARTICLE 19:

Scope of tax.

XII-11-6072 S. T. 648.

Taxability of retreaded and rebuilt tires.

Advice is requested whether retreaded and rebuilt tires are subject to the tax imposed by Section 602 of the Revenue Act of 1932.

The X Company purchases used tires from which the old rubber, tread, and side walls (including the name) are buffed off; the carcasses are then retreaded or rebuilt

by the use of new and/or reclaimed rubber and sold under various trade names, marked "Retreaded" on the side walls as a protection against any claim by the purchaser that they were sold as "new" tires. The old tires lose their identity in the process of retreading or rebuilding. Other used tires are retreaded by merely resurfacing or replacing the actual tread down to the tread line, the side walls showing the original name and the serial number not being disturbed.

The test of taxability where old material or material partly old and partly new is used in producing a tire suitable for use is whether the work done constitutes the manufacture of a tire or is merely a repair job. If the former, the tax is legally due. If the latter, no tax is involved. It is held that where the identity of the old tire is lost in the process the manufacture of a taxable tire results.

For example, where old tires are rebuilt from old carcasses by the use of either raw or reclaimed rubber, to the extent that the tires are not identifiable as the original tires, they are subject to tax when sold, on the basis of the full weight thereof, as provided by Section 602 of the Revenue Act of 1932.

Where tires are retreaded or rebuilt to order for customers who retain title to the old tires or carcasses, the person retreading the tires is not subject to tax.

The retreading of old tires by resurfacing or replacement of the actual tread down to the tread line, without altering the side walls or destroying the original identity of the tire, does not constitute the manufacture of a taxable article. (Italics supplied.)

Treasury Regulations 46, approved June 18, 1932:

Art. 4. Who is a manufacturer or producer.—As used in the Act, the term "producer" includes a person who produces a taxable article by processing, manipulating, or changing the form of an article, or produces a taxable article by combining or assembling two or more articles.

Under certain circumstances, as where a person manufactures or produces a taxable article for a person who furnishes materials and retains title thereto, the person for whom the taxable article is manufactured or produced, and not the person who actually manufactures or produces it, will be considered the manufacturer.

A manufacturer who sells a taxable article in a knock-down condition, but complete as to all component parts, shall be liable for the tax under Title IV and not the person who buys and assembles a taxable article from such component parts.

No. 9469

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT 3

UNITED STATES OF AMERICA,

Appellant,

vs.

ARMATURE EXCHANGE, INCORPORATED, a corporation, also known as THE ARMATURE EXCHANGE, a corporation, also known as THE ARMATURE EXCHANGE INCORPORATED, a corporation,

Appellee.

PETITION FOR REHEARING EN BANC ON BEHALF OF APPELLEE, THE ARMATURE EXCHANGE, A CORPORATION.

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Attorney for Appellee.

Parker & Baird Company, Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

No. 9469

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Appellee.

PETITION FOR REHEARING EN BANC ON BEHALF OF APPELLEE, THE ARMATURE EXCHANGE, A CORPORATION.

To the Honorable Circuit Court of Appeals for the Ninth Circuit:

Appellee The Armature Exchange, a corporation, respectfully petitions for a rehearing *en banc,* of this appeal and urges the court to reconsider its decision in this case for the following reasons and upon the following grounds:

I.

The Decision Is in Conflict With the Law, the Statute and Decisions of the Supreme Court and Circuit Courts of Appeals for Other Circuits.

The Supreme Court of the United States has announced in its decision in the case of *Cadwalader v. Jessup & Moore,* 149 U. S. 350:

> "The uncontradicted testimony is to the effect that the only commercial use or value of the old india rubber shoes, or scrap rubber, or rubber scrap in question, is by reason of the india rubber contained therein, as a substitute for crude rubber; that the old shoes were of commercial use and value only by reason of the india rubber they contained, as a substitute for crude rubber, *and not by reason of any preparation or manufacture which they had undergone;* that they could not fairly be called 'articles composed of india rubber,' and as such dutiable at 25 per centum ad valorem; and that, although the shoes may have been originally manufactured articles composed of india rubber, they had lost their commercial value as such articles, and substantially were merely the material called 'crude rubber.' They were not fabrics or india rubber shoes, because they had lost substantially their commercial value as such." (Italics supplied.)

It is respectfully submitted that the armatures which are the subject under discussion in the instant case had a value far in excess of their value as raw material because of the manufacturing processes they had previously undergone. Under the rule established by the above case it is

essential that the only value be that of raw material. That if the value of the article results from the manufacturing process previously undergone, then the value is because of that manufacturing process, and not as raw material. The record indicates that the appellee herein paid from fifty cents to one dollar for each armature, which was far in excess of the junk or raw material value. [R. 72.]

Appellee cites *Hartranft v. Wiegmann,* 121 U. S. 609, as an additional authority on the question of who is a manufacturer and what is manufacturing. The issue in that case concerned the rate of duty to be levied upon certain shells depending upon whether they were or were not "manufactured." The question involved and the facts are stated in the opinion by Mr. Justice Blatchford, as follows, 1 C. 613-14:

> "The question is whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer is a manufacture of the shell, the object of these manipulations being simply for the purpose of ornament, and some of the shells being afterwards etched by acids, so as to produce inscriptions upon them. It appears that these shells in question were to be sold for ornaments, but that shells of these descriptions have also a use to be made into buttons and handles of penknives; and that there is no difference in name and use between the shells ground on the emery wheel and those not ground. It is contended by the government that the shells prepared by the mechanical or chemical means stated in the record, for ultimate use, are shells manufactured, or manufacturers of shells, within the meaning of the statute."

The conclusion of the court and the reasoning supporting it are set forth in the following excerpt from the opinion l. c. 615:

> "We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufacturers, but were shells not manufactured, and fell under that designation in the free list. They are still shells. *They had not been manufactured into a new and different article, having a distinctive name, character or use from that of a shell.* The application of labor to an article, either by hand or by mechanism, does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Washing and scouring wool does not make the resulting wool a manufacture of wool. Cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton. In 'Schedule M' of Section 2504 of the Revised Statutes, page 475, 2nd Edition, a duty of 30 per cent *ad valorem* is imposed on 'coral cut or manufactured'; and in Section 2505, page 484, 'coral marine, unmanufactured,' is exempt from duty. These provisions clearly imply that, but for the special provisions imposing a duty on cut coral, it would not be regarded as a manufactured article, although labor was employed in cutting it. In *Frazee v. Moffit,* 20 Blatchf. 267, it was held that hay pressed in bales, ready for market, was not a manufactured article, although labor had been bestowed in cutting and drying the grass and baling the hay. In *Lawrence v. Allen,* 48 U. S. 7 How. 785, it was held that india rubber shoes, made in Brazil, by simply allowing the sap of the india rubber tree to harden upon a mold, were a manufactured article, because it was capable of use in that shape as a shoe, and had been put into

a new form, capable of use and design to be used in such new form. In *United States v. Potts,* 9 U. S. 5 Cranch 284, round copper plates turned up and raised at the edges from four to five inches by the application of labor, to fit them for subsequent use in the manufacture of copper vessels, but which were still bought by the pound as copper for use in making copper vessels, were held not to be manufactured copper. In the case of *United States v. Wilson,* 1 Hunt's Merchants' Magazine 167, Judge Betts held that marble which had been cut into blocks for the convenience of transportation was not manufactured marble, but was free from duty, as being unmanufactured.

"We are of the opinion that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, 'as duties are never imposed on citizens upon vague or doubtful interpretations.' *Powers v. Barney,* 5 Blatchf. 202; *U. S. v. Isham,* 84 U. S., 17 Wall. 496, 504; *Gurr v. Scudds,* 11 Exch. 190, 191; *Adams v. Bancroft,* 3 Sumn. 384." (Italics supplied.)

The third case cited is *Anheuser-Busch Brewing Association v. U. S.,* 207 U. S. 556, in which the plaintiff sued to recover certain import duties which it paid on corks designed for use in bottling beer.

Under the act there involved plaintiff was required to prove as the basis of its refund or "drawback" that the corks involved were not manufactured corks, but merely materials imported to be used in the manufacture of corks in the United States. The evidence showed that the corks when imported into this country from Spain had already

been cut by hand to the required size. It was further shown that in such condition, however, they were not suitable for use in bottling beer because they would not retain the gas in the bottle and because they would impart a cork taste to the beer, thereby making it unmarketable and unfit for use. After importation, however, the corks were subjected in the brewing company's plant to various processes and treatment consuming several days of time, during which the corks were treated, processed, sealed and coated so as to render them useful for the intended purpose. The court found that the process to which the corks were subject did not constitute manufacture; that the corks were manufactured before they were imported and that the brewing company was not entitled to its refund. In the opinion by Mr. Justice McKenna it is said, l. c. 559:

> "The corks in question were, after their importation, subject to a special treatment which, it is contended, caused them to be articles manufactured in the United States of 'imported materials' within the meaning of Section 25. The Court of Claims decided against the contention and dismissed the petition. 41 Ct. Cl. 389.
>
> "The treatment to which the corks were subjected is detailed in Finding 3, inserted in the margin.
>
> "In opposition to the judgment of the Court of Claims counsel have submitted many definitions of 'manufacture,' both as a noun and a verb, which, however applicable to the cases in which they were used, would be, we think, extended too far if made to

> cover the treatment detailed in Finding 3 or to the corks after the treatment. The words of the statute are indeed so familiar in use and meaning that they are confused by attempts at definition. Their first sense as used is fabrication or composition,—a new article is produced of which the imported material constitutes an ingredient or part. When we go further than this in explanation, we are involved in refinements and in impractical niceties. Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary, as set forth and illustrated in *Hartranft v. Wiegmann,* 121 U. S. 609, 7 Sup. Ct. Rep. 1240. *There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'* This cannot be said of the corks in question. A cork put through the claimant's process is still a cork." (Italics supplied.)

Appellee contends that the preceding cases are directly in point and are authority supporting the contention that said appellee is not a manufacturer. Under the rule laid down by the court in *Hartranft v. Wiegmann* and *Anheuser-Busch Brewing Association v. U. S., supra,* it is necessary that a new and different article of commerce emerge in order for "manufacturing" to exist. Has not this Honorable Court made an unwarranted distinction in holding that these two cases are not authority for the position of this taxpayer that it is not a "manufacturer or producer" of armatures, simply because those cases

arise under the tariff laws? At page three of the opinion, it is stated:

> "In our opinion neither of the cited cases is authority for the position of the taxpayer that it is not a 'manufacturer or producer' of armatures. In both cases the raw materials were not subject to the terms of the statute involved, the statutes relating solely to 'manufactures.' Certainly in such statutes there must be a 'transformation.' "

Appellee calls attention to the preceding paragraph of the opinion of this Honorable Court. It is there stated that the raw materials were not subject to the terms of the statutes involved. The same is true in the instant case. The raw materials are not subject to tax imposed by the act, the statute relates solely to sales by the "manufacturer or producer."

In defining the meaning of words used in statutes imposing excise taxes it is always the practice of the courts to look to other cases, including cases arising under the tariff and patent laws for guidance. In this regard the petitioner herein also relies on *American Fruit Growers, Inc. v. Brogdex,* 283 U. S. 1; *Goodyear Shoe Machinery Company v. Jackson,* 112 Fed. 146 (C. C. A. 1, 1901); *Foglesong Machinery Company v. J. D. Randall Company,* 237 Federal 893 (C. C. A. 6, 1917); *Ely Norris Safe Company v. Mosler Safe Co.,* 62 Fed. (2d) 524 (C. C. A. 2, 1933); and *Hess-Bright Mfg. Co. v. Bearing Co.,* 271 Fed. 350 (D. C. Pa., 1921).

II.

Treasury Regulations 46, Article 4, Approved June 18, 1932, Regulating Taxation of Automobile Parts and Accessories, Under Paragraph 606 (c) of the Revenue Act of 1932, Does Not Purport to Levy a Tax on the Sale of Repaired or Rebuilt Automobile Parts or Accessories.

Regulations 46, Article 4 was adopted for the purpose of clarifying the Revenue Act of 1932. Otherwise it would be claimed that certain operations which in themselves involved no manufacturing whatever, were not subject to the Act, even though automobile parts or accessories were produced. For instance, it would be possible to purchase various items which are exempt from tax and assemble them into a taxable article and sell them tax free because there was no manufacturing while, however, there was certainly production, and the person so combining or assembling them would certainly be a producer.

It was conceded by the appellant that there is no tax upon immediate repairs. However, this Honorable Court holds that because of the fact that appellee operates on a large scale, places quantities of rewound armatures in stock and sells them under a trade name, that it is a "manufacturer or producer." This places an undue burden on this petitioner because of the size of its operations and the service which it is prepared to render.

Even though this petitioner conceded, which it does not, that the above regulations had the force and effect of law, it would still be too vague and incomplete to impose a tax upon the operations of this company. This Honorable Court is well aware of the rule that the literal meaning of words can be insisted on in resistance to a taxing statute.

Certainly the finding that this taxpayer is not a "manufacturer or producer" would not reduce the statute to empty declarations as is inferred by the court in the opinion on file herein.

It is conceded that had this taxpayer purchased new cores with which to produce armatures that it would be subject to the Revenue Act of 1932. Petitioner cites *Thurman, Collector v. Swisshelm* (C. C. A. 7), 36 Fed. (2d) 350. The principle underlying the *Swisshelm* case is no different from the instant case. Swisshelm commenced his process with an automobile, completely manufactured and tax paid by the manufacturer; the plaintiff in this case commenced its work with an armature previously manufactured and tax paid by the manufacturer. When Swisshelm finished his process, he still had an automobile—he had created nothing new; when appellee in this case completed the rewinding process, it still had an armature—it had created nothing new. In the *Swisshelm* case the court distinguished the case of *Klepper v. Carter* (C. C. A. 9), 286 Fed. 370, which is cited by this court, and said L. C. 351:

> "The facts are different in that there (referring to the Klepper case) no truck figured in the transaction until the parts had been assembled and connected; while here appellees bought the completed automobile, upon which the tax had already been paid."

There is no evidence in the record to sustain the court's statement that this taxpayer utilized used cores, which had been *discarded and were out of circulation* in the completed article.

Conclusion.

By reason of the fact that the question involved herein is of grave importance to not only the appellee, but also to many other companies throughout the United States, engaged in the same business, and because certain misunderstandings have already arisen wherein some of them claim not to be affected by the decision because their operations differ somewhat from those detailed in the opinion and findings of the trial court, it is respectfully submitted that this Honorable Court grant a rehearing *en banc,* of this appeal in order that the full import of the decisions of the Supreme Court and Circuit Courts of Appeals involving patent and tariff laws may be applied by this Honorable Court in its decision of the appeal.

It is respectfully submitted that under the statute, regulations and decisions of the Supreme Court and various Circuit Courts of Appeals that this appellee is not subject to the tax imposed by Section 606 (c) of the Revenue Act of 1932, and therefore appellee's petition for rehearing *en banc* should be granted.

Respectfully submitted,

DARIUS F. JOHNSON,
Attorney for Appellee.

Certificate of Counsel.

I, Darius F. Johnson, counsel for the above appellee, do hereby certify that the foregoing petition for rehearing *en banc* of this cause is presented in good faith and not interposed for the purpose of delay.

DARIUS F. JOHNSON.

No. 9473

United States

Circuit Court of Appeals

For the Ninth Circuit.

MARYLAND CASUALTY COMPANY, a corporation,

Appellant,

vs.

MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index Page

Index Page

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

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Attorneys for Defendant and Appellant,
Mazilla Tighe

In the District Court of the United States in and for the Northern District of California, Southern Division.

Equity No. 4279 S

MARYLAND CASUALTY COMPANY, a corporation,

Plaintiff,

vs.

MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF, ETC.

Plaintiff, Maryland Casualty Company, brings this suit under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, section 274d, 28 U.S.C.A. section 400), and alleges:

I.

That plaintiff, Maryland Casualty Company, is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized and licensed to do business in the State of California, and having its principal place of business within the State of [1*] California, in the City and County of San Francisco.

*Page numbering appearing at foot of page of original certified Transcript of Record.

II.

That defendant Mazilla Tighe is a citizen of the State of California, and resides in the County of Alameda in said state; that defendant Ah Chong is a citizen and subject to the Republic of China, and resides in the City and County of San Francisco, in the State of California; that defendant Leong Cheung is a citizen of the State of California, and resides in the City and County of San Francisco in said state.

III.

That the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.).

IV.

That this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, section 274d, 28 U. S. C. A. section 400).

V.

That on or about the 3rd day of April, 1937, plaintiff issued a policy of automobile insurance to defendant Ah Chong; that the policy period was from April 3, 1937, to April 3, 1938, and said policy was in effect during all of said period; that in said policy plaintiff agreed with defendant Ah Chong to pay on behalf of defendant Ah Chong, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums, not exceeding

$5,000. for each person and not exceeding $10,000. for each accident, which defendant Ah Chong should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance and use of a certain automobile described in said policy as a 1929 model Kleiber 1½ Ton Truck, M#16EC7717; that said policy further provided [2] that the purposes for which said automobile was to be used were commercial and that use of said automobile for said purposes included the loading and unloading thereof; that a true copy of said policy is attached hereto marked Exhibit "A" and the same hereby is made a part hereof.

VI.

That on or about the 25th day of January, 1938, defendant Mazilla Tighe commenced an action for damages against defendants Ah Chong and Leong Cheung in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants, and numbered therein No. 278962; that in the complaint of said Mazilla Tighe in said action said Mazilla Tighe alleged that on the 26th day of November, 1937, said Leong Cheung was an employee of said Ah Chong and, while so employed, said Leong Cheung made a delivery of vegetable prod-

uce to a restaurant known as Piccadilly Inn and located in the 300 block in Sutter Street in San Francisco, from a delivery truck parked at the curb on said Sutter Street and opposite to, and about ten feet from, the entrance of said Piccadilly Inn; that at said time and place said Mazilla Tighe was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilly Inn; that at said time and place said Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: that after making a delivery to the aforesaid Piccadilly Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder as he continued running forward, in a negligent and careless manner; that he ran toward the aforesaid [3] truck at the curb, and in so doing collided with said Mazilla Tighe as she walked along the aforesaid sidewalk, with such force and effect that said Mazilla Tighe was knocked violently to the sidewalk and was caused to sustain injuries as more particularly in said complaint appears; that as a result of said collision said Mazilla Tighe suffered injuries and loss of earning capacity, and incurred and will incur expense for medical and nursing attention, in the aggregate amount, to the date of filing said complaint, of $10,390.; in said complaint said Mazilla Tighe prays for judgment against said Ah Chong

and Leong Cheung, and each of them, as follows: For general damages in the sum of $10,000., for special damages incurred to date of filing said complaint in the sum of $390., for such further special damages as may be incurred subsequent to the date of filing said complaint, for costs of suit, and for such other and further relief as to the Court may seem meet in the premises; that a true copy of said complaint is attached hereto, marked Exhibit "B", and the same hereby is made a part hereof.

VII.

That on or about the 31st day of January, 1938, defendant Ah Chong for the first time advised plaintiff that said action for damages had been commenced, and until so advised plaintiff had no information that such action had been commenced or that any accident previously had occurred as alleged in said complaint or in which said defendants Leong Cheung and Mazilla Tighe, or either of them, had been involved, or that any claim for damages had been or was being made by defendant Mazilla Tighe by reason thereof.

VIII.

That an actual controversy exists as between plaintiff and defendants herein, as follows: Defendants Ah Chong and Leong Cheung contend that since the automobile referred to in said [4] complaint in said action brought by said Mazilla Tighe is the same automobile described in said insurance policy plaintiff herein has the obligation under said

policy to defend said Ah Chong and Leong Cheung in said action; further, defendants Ah Chong, Leong Cheung and Mazilla Tighe contend that if it should be adjudged in said action that said Ah Chong and Leong Cheung have any liability to pay any sums to said Mazilla Tighe by reason of the alleged accident set forth in said complaint in said action, then plaintiff herein has the obligation under said policy to pay said sums to said Mazilla Tighe up to the aggregate amount of $5,000.; on the other hand, plaintiff herein denies and controverts said contentions and each of them and on its part contends that although the automobile referred to in said complaint of said Mazilla Tighe is the same automobile described in said policy of insurance, plaintiff herein has no obligations or liability under said policy so far as said alleged accident is concerned because said alleged accident did not arise out of the use of said automobile or the loading or unloading thereof; further plaintiff herein contends that it was released of all obligations and liability under said policy so far as said accident is concerned by reason of the failure of defendant Ah Chong to notify plaintiff that any such accident occurred for more than sixty days after it is alleged in said complaint the same occurred.

IX.

That defendant Ah Chong has requested plaintiff herein to defend in the names and on behalf of defendants Ah Chong and Leong Cheung, said action brought by said Mazilla Tighe; that plaintiff herein

has consented to so defend said action, subject however to an express and complete reservation of all rights of plaintiff; that said action is now at issue. [5]

X.

That the continued defense of said action in said Superior Court by plaintiff herein will result in loss and damage to plaintiff by reason of the expenses that thereby will be incurred by plaintiff; that a declaratory judgment or decree herein determining the rights and other legal relations of the parties hereto is necessary to enable plaintiff herein properly to reach its decision respecting its continued defense of said action in said Superior Court, and to protect plaintiff if it should decide not to continue further with said defense, and to avoid the damages and loss that will result to plaintiff by reason of the accrual of expenses incident to the continuation of said defense; that the entry of a declaratory judgment or decree herein is necessary to avoid the loss and damages that will accrue to plaintiff in the event said action in said Superior Court should proceed to decision, and judgment should be entered therein for said Mazilla Tighe, since, in such event, unless a declaratory judgment or decree has been entered herein determining plaintiff herein has no liability under any judgment in said action in said Superior Court, plaintiff will be obliged to defend against the claims of defendants herein that plaintiff is liable to pay said judgment in said Superior Court action up to the aggregate amount of $5,000.

XI.

That plaintiff is informed and believes and on such information and belief alleges that unless defendants herein are enjoined they will proceed with the trial of said action in said Superior Court; that unless a preliminary injunction is granted herein restraining defendants herein, and each of them, and their respective attorneys, from taking any further proceedings in said Superior Court action until this Court enters its final judgment or decree herein, said judgment or decree herein will be rendered [6] ineffectual in that plaintiff herein will be deprived of the benefit and protection of said judgment or decree so far as plaintiff's decision respecting the defense of said Superior Court action is concerned; that unless such preliminary injunction is so granted herein, plaintiff herein will suffer irreparable loss and damage in that plaintiff herein will have no right to recover the expenses, or any part of the expenses, plaintiff herein will incur by reason of the defense of said Superior Court action.

XII.

That plaintiff is informed and believes and on such information and belief alleges that unless defendants herein are enjoined they will proceed with the trial of said action in said Superior Court and if judgment is entered therein for said Mazilla Tighe, defendants herein will undertake to impose upon plaintiff herein liability for the payment of said judgment up to the aggregate amount of $,5000;

that unless a preliminary injunction is granted herein restraining defendants herein, and each of them, and their respective attorneys, until this court enters its final judgment or decree herein, from taking any further proceedings in said Superior Court action, and from taking any proceedings for the purpose of imposing any liability upon plaintiff herein based upon any judgment that may be rendered for said Mazilla Tighe in said Superior Court action, plaintiff herein will suffer irreparable loss and damage in that plaintiff herein will be obliged to employ counsel to defend against said claim that plaintiff herein is liable to pay said judgment up to the aggregate amount of $5,000. and plaintiff herein will have no right to recover the expenses that will be so incurred, or any part thereof; that the granting of such preliminary injunction is necessary to avoid multiplicity of judicial proceedings in that any proceedings to impose liability upon plaintiff herein based upon any judgment for said Mazilla [7] Tighe in said Superior Court action will present the same issues and questions as those presented by this suit for a declaratory judgment or decree; that if such injunction is not so granted and the claims of defendants herein that plaintiff herein is liable to pay any judgment for said Mazilla Tighe in said Superior Court action up to the aggregate amount of $5,000. are adjudicated in favor of said claims, any judgment or decree that may be rendered herein for plaintiff herein will be rendered ineffectual.

Wherefore, plaintiff prays:

(a) That defendants and each of them be required to answer this bill of complaint in the nature of a petition for declaratory judgment.

(b) That this Court adjudge, decree and declare the rights and legal relations of the parties under and by reason of that certain policy of automobile insurance hereinabove referred to in order that such declaration have the force and effect of a final judgment and decree.

(c) That this Court adjudge and decree that plaintiff herein has no obligation under said policy of automobile insurance to defend defendants Ah Chong and Leong Cheung, or either of them, in that certain action hereinabove referred to, brought by defendant Mazilla Tighe in the Superior Court of the State of California, in and for the City and County of San Francisco.

(d) That this Court adjudge and decree that plaintiff herein has no liability under said policy of automobile insurance by reason of the alleged accident set forth in said complaint in said action brought by said Mazilla Tighe in said Superior Court, because said alleged accident did not arise out of use of said automobile described in and covered by said policy, and because of the failure of defendant Ah Chong to give plaintiff herein any notice [8] of said alleged accident for more than sixty days after said accident is alleged to have *incurred.*

(e) That this Court grant a preliminary injunction restraining the defendants herein, and each of

them, and their respective attorneys, until this Court enters its final judgment or decree herein, from taking any further proceedings in said action in said Superior Court, and from taking any proceedings for the purpose of imposing any liability upon plaintiff herein based upon any judgment that may be rendered for said Mazilla Tighe in said Superior Court action.

(f) For such other and further relief as may to the Court seem meet in the premises.

TREADWELL & LAUGHLIN
Attorneys for Plaintiff [9]

State of California,
City and County of San Francisco—ss.

Reginald S. Laughlin, being first duly sworn, says: I am one of the attorneys for plaintiff in this action. I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge, except as to matters stated therein on information and belief, and as to those matters I believe it to be true. The reason why this verification is not made by an officer of plaintiff corporation is that none of its officers are now within the State of California where I reside.

REGINALD S. LAUGHLIN

Subscribed and sworn to before me this 20th day of June, 1938.

[Seal] LULU P. LOVELAND
Notary Public in and for the City and County of San Francisco, State of California [10]

EXHIBIT "A"
AUTOMOBILE POLICY

Maryland Casualty Company
Baltimore

DECLARATIONS

Item 1. Name of Insured—Ah Chong
Address—128 Oregon Street, San Francisco,
No. Street County Town
California
State

The automobile will be principally garaged and used in the above town, county and state, unless otherwise specified herein.

The occupation of the named insured is Fruit and Vegetable Peddler

(If married woman, give husband's occupation or business)

Item 2. Policy Period: From April 3rd, 1937 to April 3rd, 1938 12.01 A. M., Standard Time at the address of the named insured as stated herein.

Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto.

The purposes for which the automobile is to be used are Commercial.

COVERAGES	LIMITS OF LIABILITY
A—Bodily Injury Liability	$5,000.00 each person and subject to that limit for each person $10,000.00 each accident
B—Property Damage Liability	$ each accident

The word "none" in the premium columns below shall mean that no insurance is afforded under the respective coverages.

Description of the automobile and facts respecting its purchase by the named insured

Trade Name	Model Year	Model Series	No. Cyl.	Type of Body and Load Capacity	Serial No. (S) and Motor No. (M)	List Price and Date Purchased. New or Used.	Premiums Coverage A. Bodily Injury Liability	Premiums Coverage B. Property Damage Liability
Kleiber	1929			1½ Ton Truck	M#16EC7717		$45.00	$17.00
						Totals	$5.00	$17.00
Special charge for Drive Other Car coverage as per endorsement attached, if any							$	$
Special charge for						as per endorsement attached		
						Total Premium		$62.00

(a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named insured's business occupation as expressed in Item 1. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

The nationality and color (state both) of the named insured are Chinese—Oriental.

The risk was insured during the past year in Maryland.

The named insured is the sole owner of the automobile, except as herein stated: No Exceptions.

No insurer has cancelled any automobile insurance issued to the named insured during the past year, except as herein stated: No Exceptions.

Countersigned this 3rd day of April, 1937.

By.....

Authorized Representative.

[11]

Policy No. 15—537989

Maryland Casualty Company
(A stock insurance company, herein called the company)

Does hereby agree with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the declarations and subject to the

limits of liability, exclusions, conditions and other terms of this policy:

Insuring Agreements

I

Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage B—Property Damage Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

II

Defense, Settlement, Supplementary Payments. It is further agreed that as respects insurance afforded by this policy under coverages A and B the company shall

(a) defend in his name and behalf any suit against the insured alleging such injury or de-

struction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and any expense incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

The company agrees to pay the expenses incurred under divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy.

III

Automatic Insurance for Newly Acquired Automobiles

If the named insured who is the owner of the automobile acquires ownership of another automo-

bile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: (1) if the company insures all automobiles owned by the named insured at the date of such delivery, insurance applies to such other automobile, if it is used for pleasure purposes or in the business of the named insured as expressed in the declarations, but only to the extent applicable to all such previously owned automobiles; (2) if the company does not insure all automobiles owned by the named insured at the date of such delivery, insurance applies to such other automobile, if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery; and (4) this agreement does not apply (a) to any loss against which the named insured has other valid and collectible insurance, nor (b) unless the named insured notifies the company within ten days following the date of delivery of such other automobile, nor (c) except during the policy period, but if the date of delivery of such other automobile is prior to the effective date of this policy the insurance applies as of the effective date of this policy, nor (d) unless the named insured pays any additional premium required because of the application of this insurance to such other automobile.

IV

Definition of "Insured."

The unqualified word "insured" wherever used in coverages A and B and in other parts of this policy, when applicable to these coverages, includes not only the named insured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the automobile is "pleasure and business" or "commercial", each as defined herein, and provided further that the actual use is with the permission of the named insured. The provisions of this paragraph do not apply:

(a) to any person or organization with respect to any loss against which he has other valid and collectible insurance;

(b) to any person or organization with respect to bodily injury to or death of any person who is a named insured;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of the operation thereof;

(d) to any employee of an insured with respect to any action brought against said employee because of bodily injury to or death of another employee of the same insured injured in the course of such employment in an accident

arising out of the maintenance or use of the automobile in the business of such insured.

V.

Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur during the policy period, while the automobile is within the United States in North America (exclusive of Alaska) or the Dominion of Canada, or while on a coastwise vessel between ports within said territory, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

Exclusions

This policy does not apply:

(a) while the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented under contract or leased, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) while the automobile is used for the towing of any trailer not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile not covered by like insurance in the company;

(c)) while the automobile is operated by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person or to his occupation, or by any person in any prearranged race or competitive speed test;

(d) to any liability assumed by the insured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named insured in the automobile, without the written consent of the company;

(e) under coverage A, to bodily injury to or death of any employee of the insured while engaged in the business of the insured, other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which the insured may be held liable under any workmen's compensation law;

(f) under coverage B, to property owned by, rented to, leased to, in charge of, or transported by the insured.

Conditions

1. Automobile Defined. Two or More Automobiles. Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semi-trailer described herein; and the word "trailer" shall include semi-trailer. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

2. Limits of Liability. Coverage A. The limit of bodily injury liability expressed in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of

bodily injury to or death of one person in any one accident; the limit of such liability expressed in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of two or more persons in any one accident.

3. Limits of Liability. Coverages A and B. The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

4. Financial Responsibility Laws. Any insurance provided by this policy for bodily injury liability or property damage liability shall conform to the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising from the use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim or suit, involving a breach of the terms of this policy and for any payment the company would not have been obligated to make under the provisions of this policy except for the agreement contained in this paragraph.

5. Notice of Accident.—Claim or Suit. Upon the occurrence of an accident written notice shall

be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

6. Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits and the company shall reimburse the insured for any expense, other than loss of earnings, incurred at the company's request. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

7. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the conditions hereof, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against

the insured after actual trial or by written agreement of the insured, the claimant, and the company, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured shall not relieve the company of any of its obligations hereunder.

8. Other Insurance. If the named insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability expressed in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

9. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall execute all papers required and shall do everything that may be necessary to secure such rights.

10. Changes. No notice to any agent, or knowledge possessed by any agent or by any other person

shall be held to effect a waiver or change in any part of this policy nor estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the President, a Vice-President, the Secretary or an Assistant Secretary of the company, and countersigned by an authorized representative of the company.

11. Assignment. No assignment of interest under this policy shall bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within thirty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) subject otherwise to the provisions of Insuring Agreement IV, any person having proper temporary custody of the automobile, as an insured, until the appointment and qualification of such legal representative, but in no event for a period of more than thirty days after the date of such death or adjudication.

12. Cancelation. This policy may be canceled by the named insured by mailing written notice to the company stating when thereafter such cancelation shall be effective, in which case the company shall, upon demand, refund the excess of premium paid by such insured above the customary short rate

premium for the expired term. This policy may be canceled by the company by mailing written notice to the named insured at the address shown in this policy stating when not less than five days thereafter such cancelation shall be effective, and upon demand the company shall refund the excess of premium paid by such insured above the pro rata premium for the expired term. The mailing of notice as aforesaid shall be sufficient proof of notice and the insurance under this policy as aforesaid shall end on the effective date and hour of cancelation stated in the notice. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing. The company's check or the check of its representative similarly mailed or delivered shall be a sufficient tender of any refund of premium due to the named insured. If required by statute in the state where this policy is issued, refund of premium due to the named insured shall be tendered with notice of cancelation when the policy is canceled by the company and refund of premium due to the named insured shall be made upon computation thereof when the policy is canceled by the named insured.

13. Declarations. By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, the Maryland Casualty Company has caused this policy to be signed by its president and secretary at Baltimore, Maryland, and countersigned on the declarations page by a duly authorized representative of the company.

SILLIMAN EVANS,
President

JNO. A. HARTMAN
Secretary [12]

Endorsement
#1
(Which shall only be effective on and after date hereof)
Date April 3rd, 1937

In consideration of the premium at which this Policy is written, it is hereby understood and agreed that the Assureds business is exclusively retail and that the regular and frequent use of the commercial automobiles covered by this Policy is and will be confined during the Policy period to the territory within a 25 mile radius of the place of principal garaging of such automobiles that no regular or frequent trips are or will be made during the Policy period to any location beyond a 25 mile radius from the place of principal garaging of such automobiles.

Nothing herein contained shall be held to vary, alter, waive, or extend any of the terms, limits or conditions of the Policy, except as hereinabove set forth.

This endorsement forms a part of Policy No. 15-537989 issued to Ah Chong.

MARYLAND CASUALTY
COMPANY
SILLIMAN EVANS,
President

Countersigned

.....

Authorized Representative

A Stock Company

AUTOMOBILE POLICY

No. 15—.....

Maryland Casualty Company

Issued to—

Premium, $.....

Expires.....19.....

Please Read Your Policy

Carefully note conditions requiring immediate notice of every accident and of every suit.

SPECIAL SERVICE FOR
MARYLAND POLICYHOLDERS

The Service Card delivered with this policy should be carried with you at all times. In case of an accident it is your guarantee of indispensable service in time of trouble.

The Service Card enables you to secure a release of attachment bond or a bail bond with the least

possible delay or trouble and is your introduction to the thousands of Maryland Agents at your command.

The Maryland Casualty Company issues all forms of casualty insurance and surety bonds in the United States, Alaska, Hawaii, Puerto Rico, Canada, Canal Zone, Cuba. Agents everywhere.

EXHIBIT "B"

In the Superior Court of the State of California in and for the City and County of San Francisco

No. 278962

MAZILLA TIGHE

Plaintiff,

vs.

AD CHONG, LEONG CHEUNG, John Doe, Richard Roe, Black and White Company, a corporation,

Defendants.

COMPLAINT FOR DAMAGES

Plaintiff above named complains of the defendants above named, and each of them, and for cause of action alleges as follows:

I.

That plaintiff is ignorant of the true names of the defendants John Doe, Richard Roe, Black and White Company, a corporation, and for that reason they are sued herein under said names as fictitious names, and plaintiff prays that when the true names of these defendants are ascertained, that they may be inserted herein, and in all subsequent proceedings in said action, and that the said action may then proceed against them under their true names.

II.

That at all times herein mentioned the defendant Ad Chong [13] was, and now is, engaged in the wholesale produce business and carries on said business in the City and County of San Francisco; that the office of said business is located at No. 128 Oregon Street in said city and county; that at all times herein mentioned Leong Cheung was an employee, agent and servant of Ad Chong and was acting within the scope and course of his said employment.

III.

That on the 26th day of November, 1937, the defendant Leong Cheung was an employee, agent and servant of his co-defendant Ad Chong, and was by him regularly employed to distribute and deliver vegetable produce, and in the performance of said employment said defendant Leong Cheung was required to, and he did, operate and drive a certain delivery truck for the purpose of making deliveries

of produce to various retail trade in said City and County of San Francisco; that said deliveries were made by said Leong Cheung by carrying vegetable produce from the said truck to various patrons of his employer, Ad Chong.

IV.

That at all times herein mentioned Sutter Street was and now is a public street in the City and County of San Francisco, California; that said street runs in a general easterly and westerly direction; that on said street, and in the block numbered "300", a restaurant is located known as the "Piccadilli Inn"; that plaintiff herein is informed and believes, and upon such information and belief alleges the fact to be, that at times herein mentioned the aforesaid Piccadilli Inn was a customer of said Ad Chong and customarily and at intervals receives produce vegetables from said Ad Chong, and by and through the delivery thereof by Leong Cheung.

V.

That on or about the 26th day of November, 1937, and in the morning thereof at approximately 8:34 A. M., defendant Leong Cheung [14] was making a delivery of produce vegetables to the said Piccadilli Inn, and that at said time and place he had left his aforesaid delivery truck standing parked at the curb and opposite to, and about ten feet from, the entrance of said Piccadilli Inn.

That at said time and place the plaintiff herein was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilli Inn; that at said time and place defendant Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: That after making a delivery to the aforesaid Piccadilli Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder as he continued running forward, in a negligent and careless manner; that he ran toward the aforementioned truck at the curb, and in so doing collided with the plaintiff herein as she walked along the aforesaid sidewalk, with such force and effect that plaintiff was knocked violently to the sidewalk and was caused to sustain injuries as more particularly hereinafter appears.

VI.

That as a direct and proximate cause of said collision and the negligence of the defendants, plaintiff Mazilla Tighe suffered and received the following injuries, to-wit, a broken scapula bone, wrenched and displaced shoulder blade, and as a result thereof plaintiff will be totally disabled for one year and more, and plaintiff will always suffer disability from said injuries; that in addition thereto plaintiff suffered severe bruises and sprains of her

lower back, and was bruised, wounded and contused generally over her body and suffered, and is suffering therefrom, great physical and nervous shock, and she is now and for the remainder of her life will be maimed, disabled and lame. [15]

VII.

That as a direct result of said injuries the plaintiff has suffered permanent loss and impairment of her health, and as a direct result of the defendants' negligence and plaintiff's bodily injuries caused thereby as aforesaid, and the consequent pain, anxiety, mental anguish, grief, mortification, physical suffering, loss of earning capacity, and the general damages which the plaintiff has suffered and will continue to suffer by reason of her said injuries, plaintiff has been and is generally damaged in the sum of Ten Thousand ($10,000.00) Dollars.

VIII.

That plaintiff herein was at the time of said accident and had for a period of some years prior to the accident, been regularly employed in a department store in said City and County of San Francisco, and had been earning the approximate sum of Eighty-Five ($85.00) Dollars per month; that as a direct and proximate result of said injuries as aforesaid plaintiff herein has lost two months employment and has been specially damaged to date in the sum of One Hundred and Seventy ($170.00) Dollars; that plaintiff will be further damaged in

this respect in an amount which she cannot at this time determine and she prays that when the full extent of her damage is ascertained, that this complaint may be amended to provide for same.

IX.

That as a direct and proximate result of said collision, and the injuries and negligence of said defendants, it was necessary for plaintiff to, and she did, retail the services of physicians and surgeons to treat the injuries sustained by her as aforesaid, and it will be necessary for the plaintiff to receive further medical attention for a period of time which cannot at the date of filing this complaint be definitely [16] ascertained; that to date plaintiff has incurred an indebtedness for the reasonable value of the necessary services rendered to her by said physicians and surgeons in the amount of One Hundred ($100.00) Dollars; that plaintiff will incur a further indebtedness for the reasonable value of the necessary services to be rendered said plaintiff by said physician and surgeons in the future in an amount which cannot at this time be definitely ascertained and plaintiff prays that when the extent of the loss sustained by her in this respect is definitely ascertained, that this complaint may be amended and the same set forth herein; that by reason of the foregoing, and as a direct and proximate result of said collision and injuries and the negligence of defendants, it becomes necessary for the plaintiff herein to retain the services of a

practical nurse for her care; that the reasonable expense of said services is Sixty ($60.00) Dollars per month and plaintiff has incurred an indebtedness in the sum of One Hundred and Twenty ($120.00) Dollars in this regard to date, and will incur special damages in this respect in the future in an amount which cannot now be definitely ascertained and plaintiff prays that when the extent of the loss sustained by her in this respect is so definitely ascertained, that this complaint may be amended and the same set forth.

Wherefore, plaintiff prays judgment against said defendants, and each of them, as follows: For general damages in the sum of Ten Thousand ($10,000.00) Dollars, for special damages incurred to date in the sum of Three Hundred and Ninety ($390.00) Dollars, for such further special damages as may be incurred in the future, for plaintiff's costs of suit herein, and for such other and further relief as to the court may seem meet in the premises.

.....

Attorneys for Plaintiff [17]

State of California,
County of Alameda—ss.

Mazilla Tighe, being first duly sworn, deposes and says: That she is the plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knwledge, except as to the matters which are therein stated upon information or belief,

and as to those matters, that she believes them to be true.

MAZILLA TIGHE

Subscribed and sworn to before me this 25th day of January, 1938.

RUPERT R. RYAN

Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed June 20, 1938. [18]

[Title of District Court and Cause.]

TEMPORARY INJUNCTION

This cause came on regularly to be heard at this term upon the motion of plaintiff in said cause for a temporary injunction, upon plaintiff's verified bill of complaint and upon the motion to dismiss of defendant Mazilla Tighe, and the matter having been argued by counsel for the parties, and it appearing that the issuance of a temporary injunction is necessary to prevent irreparable loss and damage to plaintiff herein and to prevent impairment of the exercise of the court's jurisdiction herein or the enforcement of its orders:

It Hereby Is Ordered, Adjudged and Decreed that a temporary injunction be, and the same hereby is granted plaintiff against the [19] defendants above named, and their respective agents, servants and attorneys, and anyone acting by, through or

for them, restraining them, and each of them, from taking any further proceedings in that certain action pending in the Superior Court of the State of California in and for the City and County of San Francisco, entitled "Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants", and numbered therein No. 278962, and from taking any proceedings for the purpose of imposing any liability upon plaintiff herein based upon any judgment that may be rendered in said Superior Court action.

It Is Further Ordered that this temporary injunction remain in full force and effect until final hearing and determination of this cause and until further order of this court.

Dated: July 2, 1938.

(Signed) WALTER C. LINDLEY
District Judge.

[Endorsed]: Filed July 2, 1938. [20]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS AH CHONG AND LEONG CHEUNG

Come now the defendants Ah Chong and Leong Cheung and for their answer to the complaint say:

I.

Admit that the plaintiff is now and at all times mentioned in the complaint was a corporation or-

ganized and existing by virtue of the laws of the State of Maryland and licensed to do business in the State of California with principal place of business at San Francisco.

II.

Admit that defendant Ah Chong is a citizen and subject of the Republic of China; admit that defendant Leong Cheung is a citizen of the State of California; admit that both said Ah Chong and said Leong Cheung reside in the City and County of San Francisco, State of California. These answering defendants have no knowledge as to the citizenship or residence of the defendant Mazilla Tighe.

III.

Admit that the amount in controversy herein exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000).

IV.

Admit that this suit purports to be brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A. Section 400), but deny that said suit presents or involves issues properly coming within the terms of or subject to the provisions of said act. [21]

V.

Admit that on or about the 3d day of April, 1937, plaintiff issued a policy of automobile liability insurance to defendant Ah Chong; that the policy

period was from April 3, 1937, to April 3, 1938; admit that said policy was in effect during all of said period; that in said policy plaintiff agreed with defendant Ah Chong to pay on behalf of defendant Ah Chong, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums, not exceeding $5000 for each person and not exceeding $10,000 for each accident, which said defendant Ah Chong should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury sustained by any person or persons, caused by accident and arising out of the ownership, maintenance and use of a certain automobile described in said policy as a 1929 Model Kleiber 1½ Ton Truck M#16EC7717; that said policy further provided that the purposes for which said automobile was to be used were commercial and that use of said automobile for said purposes included the loading and unloading thereof; and that to the best of the knowledge and belief of these answering defendants the copy attached to said complaint and marked Exhibit "A" is a true copy of said policy.

VI.

Admit that on or about the 25th day of January, 1938, defendant Mazilla Tighe commenced an action for damages against these answering defendants in the Superior Court of the State of California, in and for the City and County of San Francisco,

entitled Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, [22] Black and White Company, a corporation, Defendants, and numbered therein No. 278,962; admit that the allegations of the complaint in said action are correctly stated in Paragraph VI of Plaintiff's complaint herein; that to the best knowledge and belief of these answering defendants the copy of the complaint in said action No. 278,962 attached to the complaint herein and marked Exhibit "B" is a true copy thereof.

VII.

Answering the allegations contained in Paragraph VII of plaintiff's complaint herein, these answering defendants admit that on or about the 31st day of January, 1938, defendant Ah Chong for the first time advised plaintiff that said action for damages had been commenced. These answering defendants have no knowledge whether, until so advised, plaintiff had or had not any information that the said action of Mazilla Tighe had been commenced; admit that neither these answering defendants nor either of them previous to the 31st day of January, 1938, notified plaintiff that they, or either of them, had been involved in the accident described in the complaint of Mazilla Tighe now on file in said action No. 278,962, as aforesaid. That the reason these answering defendants did not so notify plaintiff was that though the automobile of defendant Ah Chong insured by plaintiff as set forth in Para-

graph V of its complaint herein, was parked for unloading in front of the aforesaid Piccadilly Inn early in the forenoon of the 26th day of November, 1937, neither these answering defendants, nor either of them, or their servants, employee or agents, were involved in any accident to the said Mazilla Tighe in front of said Piccadilly Inn on the said 26th day of November, 1937, or involved in any accident to the said Mazilla Tighe [23] at any other time or place, or at all, and therefore these answering defendants under the terms of said policy of automobile liability insurance had nothing to report to plaintiff prior to the time these answering defendants were served with summons and copy of complaint in said action No. 278,962, begun by said Mazilla Tighe in the Superior Court of the State of California, in and for the City and County of San Francisco on or about the 25th day of January, 1938; that the said summons and complaint in said action No. 278,962 were forwarded to the plaintiff by defendant Ah Chong immediately after service and were received by plaintiff on the 31st day of January, 1938; that prior to service of said summons no claims were made upon these answering defendants by or on behalf of the said Mazilla Tighe.

VIII.

Answering the allegations of Paragraph VIII of plaintiff's complaint, defendants Ah Chong and Leong Cheung admit that they contend that since the automobile referred to in said complaint in said

action brought by said Mazilla Tighe is the same automobile described in said insurance policy, plaintiff herein has an obligation under said policy to defend these answering defendants in said action; these answering defendants further admit that should it be adjudged in said action that they have any liability to pay any sums to said Mazilla Tighe by reason of the alleged accident set forth in said complaint in said action, then plaintiff has the obligation under said policy to pay said sums to said Mazilla Tighe up to the aggregate amount of $5000; that said contention of these answering defendants is based upon the terms of said automobile liability insurance policy, and particularly upon those provisions reading as [24] follows: (1) "Use of the automobile for the purposes stated includes the loading and unloading thereof" (page 1 of the policy); (2) Paragraph I, page 2, of the policy, covering liability "arising out of the ownership, maintenance or use of the automobile"; (3) Sub-division (a), Paragraph II of the policy (in part), wherein plaintiff agrees to "defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent," and (4) Paragraph IV of the policy, and especially so much thereof as defines the unqualified word "insured" as including "not only the named insured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided that

the declared and actual use of the automobile is 'pleasure and business' or 'commercial,' each as defined herein, and provided further that the actual use is with the permission of the named assured''; in this behalf these answering defendants allege that said automobile was used for commercial purposes at all time during the 26th day of November, 1937, and during all times on said day its actual use by the defendant Leong Cheung was with the permission of the named insured, defendant Ah Chong; that, notwithstanding its allegations to the contrary, plaintiff has both obligation and liability under said policy to these answering defendants and to each of them; that said action in the San Francisco Superior Court did in fact arise out of the operation, maintenance and use of the said insured automobile, and that these answering defendants cannot rightfully be charged with violation of the terms of said policy in failing to report said accident for more than 60 days after its occurrence inasmuch as neither of them, nor their servants, employees or [25] agents were involved therein; deny that plaintiff was prejudiced by said delay, whatever its cause.

IX.

Answering Paragraph IX of the complaint defendants admit that defendant Ah Chong has requested plaintiff herein to defend in the names and on behalf of defendants Ah Chong and Leong Cheung said action brought by said Mazilla Tighe; that plaintiff herein has consented to so defend said

action; deny that such consent is subject to any reservation of rights whatsoever as to the defendant Leong Cheung, and as to the defendant Ah Chong is subject only to such purported reservation of rights as has been effected by a certain letter from plaintiff to defendant Ah Chong dated March 7, 1938, a copy of which is attached hereto marked "Exhibit 1," and made a part hereof.

X.

Answering the allegations contained in Paragraph X of the complaint herein, defendants Ah Chong and Leong Cheung deny that the continued defense of the Superior Court action by plaintiff will result in any loss or damage to plaintiff; deny that plaintiff is entitled to a declaratory judgment, or any judgment herein, because of the matters set forth in said Paragraph X of plaintiff's said complaint.

XI.

Answering the allegations contained in Paragraph XI of the complaint, defendants Ah Chong and Leong Cheung allege that plaintiff herein is not entitled to the benefit or protection of any decree of this court, or of any court, relieving plaintiff from liability under the terms, conditions, limitations and restrictions of said policy of automobile liability insurance. [26]

XII.

Answering the allegations contained in Paragraph XII of the complaint, defendants Ah Chong

and Leong Cheung admit that if judgment is entered against them in the Superior Court action wherein Mazilla Tighe is plaintiff, these answering defendants will undertake to impose upon plaintiff herein liability for the payment of said judgment within the limit of the coverage of said policy of automobile liability insurance; deny that plaintiff is entitled to a preliminary injunction, or to any injunction, restraining these answering defendants from taking any proceedings for the purpose of imposing liability upon plaintiff herein based upon any judgment that may be rendered for said Mazilla Tighe in said Superior Court action; these answering defendants further allege that plaintiff has already accepted and undertaken the defense of said action on behalf of defendants Ah Chong and Leong Cheung and has brought it to issue, and that plaintiff is bound by its conduct and the terms of said policy of automobile liability insurance to continue said defense to a final termination, and within the limits and condition of the said policy to pay any judgment that may be rendered for Mazilla Tighe against these answering defendants, if any, or to settle said claim of Mazilla Tighe against these answering defendants.

Wherefore, defendants Ah Chong and Leong Cheung pray that this court deny the prayer of plaintiff herein for a declaratory judgment, that this suit be dismissed, and that the defendants Ah Chong and Leong Cheung have judgment for their

costs incurred herein and for such other relief as may be meet and proper in the premises.

CHARLES B. MORRIS
Attorney for Defendants Ah Chong and Leong Cheung.

[27]

DEFENDANTS' EXHIBIT No. 1

Maryland Casualty Company
Silliman Evans, Chairman of the Board
Edward J. Bond, Jr., President

San Francisco Claim Division
210 Sansome Street, San Francisco, Calif.

Geo. W. Ecrement, Jr., Mgr.
Donald Seibert, Attorney

58848-0-38-Auto
Ah Chong
BI-Mazilla Tighe

March 7, 1938

Mr. Ah Chong
128 Oregon Street
San Francisco, California
Dear Sir:

We have heretofore received from you a copy of Summons and Complaint, served upon you in an action commenced against you and your employee, Leong Chong, by Mazilla Tighe, in the Superior Court of the State of California, in and for the City and County of San Francisco, to recover damages in the sum of $10,390.00, and costs, for personal in-

juries alleged to have been sustained by the said Mazilla Tighe, as a result of an accident which occurred on or about November 26, 1937. We have accepted the defense of this action under a complete reservation of our rights, because of late notice to us of the accident, and for the other reasons herein stated.

It appears that the accident in question occurred on or about November 26, 1937, but we were not notified of same until at least January 31, 1938, and as a result we have been prejudiced in any handling of this matter.

As you are familiar, our policy, #15-537989 covers automobile accidents, and it appears that the accident in question is not such an accident as contemplated by the policy, as it does not appear that the injuries claimed by the claimant were sustained as a result of the operation of your automobile.

It is also to be noted that whereas damages sought by the plaintiff are in the sum of $10,390.00, plus costs, our liability under the terms of the policy above-mentioned is limited to the sum of $5,000.00. In the event that it appears that this company is liable under the terms of the policy, such liability, of course, is limited to the sum of $5,000.00, and any part of a judgment which might be rendered in the pending suit in excess of that sum will, therefore, have to be paid by you. [28]

We are appearing in this case on your behalf through our attorney, Donald Seibert, of 210 Sansome Street, San Francisco, who will represent you

at the trial and defend the action without expense to yourself; but we are writing you at this time to advise you that, in view of your excess interest above-mentioned, you may, if you so desire, associate your own attorney with ours in the defense of the suit, it being understood, of course, that this will be done at your own expense.

We kindly request you to acknowledge receipt of this letter on the enclosed carbon copy thereof, which we ask you to return to this office as soon as possible.

Very truly yours,
GEO. W. ECREMENT, JR.,
Mgr.

per (signed) EARL C. BERGER
Adjuster

ECB:MM

Receipt of copy of the within Answer of defendants Ah Chong and Leong Cheung with Exhibit 1 is hereby admitted this 14th day of July, 1938.

TREADWELL & LAUGHLIN
Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 15, 1938. [29]

[Title of District Court and Cause.]

ANSWER BY DEFENDANT MAZILLA TIGHE TO COMPLAINT FOR DECLARATORY RELIEF.

Comes now the above named defendant Mazilla Tighe, and answers the plaintiff's complaint for declaratory relief on file herein, as follows:

I.

Defendant Mazilla Tighe answering Paragraph I of the complaint herein, states that she has no information or belief sufficient to enable her to answer any or either of the allegations contained in said paragraph, and basing her denial on that ground, denies each and several the allegations contained in said paragraph.

II.

Answering Paragraph II of plaintiff's complaint on file herein, this defendant admits she is a citizen of the State of California and resides in the County of Alameda in said state, as set forth in said paragraph; denies each and every allegation and statement therein contained and not herein specifically admitted to be true.

III.

That defendant herein admits all of the allegations contained in Paragraph III and IV of plaintiff's complaint on file herein.

IV.

That defendant herein, answering Paragraph V of plaintiff's complaint on file herein, admits all the allegations contained in said paragraph.

V.

That defendant herein, answering Paragraph VI of plaintiff's complaint on file herein, admits all the allegations contained in said paragraph. [30]

VI.

That defendant, answering the allegations set forth in Paragraph VII of plaintiff's complaint herein, states that she has no information or belief sufficient to enable her to answer any or either of the allegations contained in said paragraph, and basing her denial on this ground, denies each and several the allegations contained in said Paragraph VII.

VII.

That defendant herein, answering Paragraph VIII of plaintiff's complaint on file herein, specifically denies that an actual controversy exists as between plaintiff and defendant herein based upon the allegations therein set forth in said paragraph contained, and beginning on line 29, page 4, to and including, and ending with the words "or unloading thereof" on line 18, page 5 of plaintiff's complaint. Defendant herein answering the remaining allegations of said paragraph, states that she has no information or belief sufficient to enable her to

answer the said allegations contained, and basing her denial on that ground, denies each and several the allegations contained in said paragraph.

VIII.

Answering Paragraph IX of plaintiff's complaint on file herein, defendant admits that the action by defendant herein against Ah Chong and Leong Cheung is now at issue as set forth in said paragraph, and further answering said paragraph, defendant herein having no information or belief upon the allegations set forth in Paragraph IX of plaintiff's complaint on file herein sufficient to enable her to answer, bases her denial on that ground and denies each and every allegations set forth in said paragraph not herein specifically admitted to be true. [31]

IX.

That defendant denies each and every allegation set forth in Paragraph X of plaintiff's complaint on file herein.

X.

Answering Paragraph XI of plaintiff's complaint on file herein, defendant herein admits that the action now pending in the State Court will go to trial in the Superior Court of the State of California, in and for the City and County of San Francisco, and further answering said paragraph, specifically denies that the refusal of this Court to order a preliminary injunction restraining all the parties in the action now pending in the State Court

as hereinbefore mentioned will render any judgment or decree by this Court for declaratory relief ineffectual, and further answering Paragraph XI of plaintiff's complaint on file herein, defendant specifically denies that plaintiff herein will suffer irreparable loss and damage, or any loss or any damage whatever.

XI.

Answering Paragraph XII of plaintiff's complaint on file herein, defendant admits that she will proceed with the trial of the action now pending in the Superior Court of California, in and for the City and County of San Francisco, and further answering said paragraph, denies each and every allegation and statement therein contained not herein specifically admitted to be true.

And As a Further, Separate and Distinct Answer and Defense, defendant herein alleges as follows:

I.

That on the 25th day of January, 1938, Mazilla Tighe, [32] defendant herein, commenced an action for damages against Ah Chong, Leong Cheung, Black and White Company, a corporation, defendants, and numbered therein No. 278962.

II.

That said action was and now is pending in a court of the State of California and is ready for

trial. That the said action is predicated upon certain personal injuries received by defendant herein through the negligence and carelessness of Leong Cheung and Ah Chong, and that said cause of action in favor of defendant herein arose in the City and County of San Francisco.

Therefore, at all times herein mentioned the Superior Court of the State of California, in and for the City and County of San Francisco has jurisdiction over the subject matter of the action now pending in said state court, and that the United States District Court, in and for the Northern District of California, Southern Division, never had or acquired jurisdiction over the subject matter of said action in the State Court. That the said United States Court having no jurisdiction, or having never acquired jurisdiction over the subject matter hereof, has no jurisdiction to issue any restraining order or preliminary injunction enjoining the proceedings of said action as hereinbefore mentioned now pending in the State Court.

Wherefore, defendant herein prays that plaintiff take nothing by its said complaint and that the temporary injunction issued herein be recalled; that the defendant be hence dismissed and have judgment for her costs herein incurred.

YOUNG & RYAN
Attorneys for Defendant
Mazilla Tighe [33]

State of California
County of Alameda—ss.

Rupert R. Ryan, being first duly sworn, deposes and says:

I am one of the attorneys for plaintiff in this action. I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge, except as to matters stated therein on information and belief, and as to those matters, I believe it to be true. The reason why this verification is not made by Mazilla Tighe is that she is out of the county where I reside.

RUPERT R. RYAN

Subscribed and sworn to before me this 23rd day of July, 1938.

[Notarial Seal] JOSEPH J. Y. YOUNG
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed Jul. 23, 1938. [34]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

A pre-trial conference having been held this day, it was agreed by counsel that the issues were as follows:

1. Whether the alleged injury was one within the terms of the policy. This to be determined upon the face of the policy and the allegations of the pleadings.

2. Whether or not the plaintiff was released from liability by reason of failure of the insured to give notice of the accident in accordance with the terms of the policy.

3. Whether or not plaintiff has waived its right to claim that the injury was not within the terms of the policy or to claim a release by failure of insured to give notice in accordance with the terms of the policy. In this connection it was stipulated that the letter attached to defendant's answer might be read in evidence without further proof.

4. An issue was raised by one of the answers as to the incorporation of the plaintiff and the authority of the corporation to do business in California, as alleged in the complaint, but this issue was withdrawn by the defendant Tighe.

5. Defendant Tighe gave notice that on the trial she would raise the question as to the jurisdiction of the court, to stay proceedings in the state court.

Done in Open Court this 20th day of March, 1939.

A. F. ST. SURE
Judge.

The foregoing Order is hereby approved.

TREADWELL & LAUGHLIN
Attorneys for Plaintiff

CHARLES B. MORRIS
Attorney for Defendants
Ah Chong and Leong Cheung

YOUNG & RYAN
Attorneys for Defendant
Mazilla Tighe.

[Endorsed]: Filed Mar. 25, 1939. [35]

[Title of District Court and Cause.]

OPINION

St. Sure, District Judge.

Plaintiff, alleging diversity of citizenship, invokes the Federal declaratory judgment act (28 USCA 400) to have its rights determined under an automobile policy of insurance issued to defendant Ah Chong.

Defendant Mazilla Tighe brought an action in the state court against defendants Ah Chong and Leong Cheung for damages for personal injuries resulting from a collision with her while she was walking along a sidewalk in Sutter Street, San Francisco. Plaintiff had issued a policy of insurance to defendant Ah Chong, a fruit and vegetable peddler, insuring against bodily injury liability and property damage "arising out of the ownership, maintenance or use of the automobile," "including the loading and unloading thereof." (Quoted language from policy). While the action was pending in the state court, plaintiff brought this suit seeking a declaratory judgment and a preliminary injunction staying the prosecution of the action in the state court. Plaintiff asks this court to declare the rights and legal relations of the parties, and that it decree that plaintiff is under no obligation to defend the action in the state court and not liable under said policy for Mazilla Tighe's injuries. On June 30, 1938, District Judge Walter C. Lindley, presiding, overruled a demurrer to the complaint and allowed a temporary injunction. 24 F. Supp. 49.

Thereafter trial was had upon the merits, and the questions for decision are (1) whether the District Court has jurisdiction under the declaratory relief act to entertain a suit against defendant Mazilla Tighe; (2) whether the District Court had jurisdiction to grant the preliminary injunction staying trial of the case in the state court; (3) whether plaintiff waived its right to make a defense herein, and (4) whether the state action and injury in question are covered by the policy. [37]

The first three questions may be readily answered in the affirmative. The right of the court to entertain the action is settled by Associated Indemnity Corp. v. Manning, 9 Cir., 92 F.(2) 168; Aetna Life Ins. Co. v. Haworth, 300 U. S. 227; Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 99 F.(2) 665; Maryland Casualty Co. v. Hubbard, 22 F. Supp. 697. Section 265 of the Judicial Code (28 USCA Sec. 379) places no limitation upon the jurisdiction of the Federal court, and if the complaint discloses a case for the exercise of equitable and injunctive powers an injunction may issue as it did in the present case. Smith v. Apple, 264 U. S. 274; Sovereign Camp Woodmen of the World v. O'Neill, 266 U. S. 292, 298; Alliance Insurance Co. of Phila. v. Jamerson, 12 F. Supp. 957; Jamerson v. Alliance Ins. Co. of Phila., 87 F.(2) 253. Because of the view hereinafter expressed upon the coverage question that of waiver becomes immaterial.

The provisions of the policy applicable to coverage are as follows:

"The purposes for which the automobile is to be used are commercial.

"(a) The term 'pleasure and business' is defined as personal, pleasure, family and business use. (b) The term 'commercial' is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named insured's business occupation as expressed in Item 1. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof. * * *

"Coverage A—Bodily injury liability. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile." [38]

The remaining question then is whether the defendants were in the act of UNLOADING the truck when the accident happened. There is no dispute that the defendants were using the automobile commercially for the transportation and delivery of vegetables in direct connection with the insured's business occupation as expressed in the policy.

In the action in the state court the pleadings admitted that the truck was parked alongside the curb

about ten feet from the Piccadilly Inn. The assistant on the truck (one of the defendants) carried from the truck and into the Inn some vegetables and was returning to the truck when he ran across the sidewalk looking backwards, and collided with Mazilla Tighe (plaintiff in said action). The evidence here shows that instead of the truck's being parked at the curb ten feet from Piccadilly Inn, it was parked at the curb on the opposite side of the street, and that the assistant making the delivery intended to return to the truck for further produce to be delivered to the Inn.

Plaintiff cites a number of cases whose similarity to the instant case is that in each an automobile was used by the insured for delivery purposes, but the crucial point of liability depending upon the "unloading" of the vehicle was determined in the light of the facts in each case. And that must be the test here.

Plaintiff contends "(1) that unloading is complete when the goods are physically removed from the truck, and that the process of delivery is entirely different from unloading; (2) that if, under any circumstances, delivery is part of unloading, the unloading is complete when the delivery is actually made; (3) so far as some future or additional unloading is concerned, it certainly would not start until some physical act was performed on or about the truck for the purpose of effecting such unloading, [39] and the mere intent in the mind of the boy in returning from the Piccadilly Inn, crossing

the sidewalk and crossing the street, to unload some further goods constituted no act of unloading within the meaning of the policy."

Such a construction of the policy as that contended for is entirely too narrow. Insured was using his truck in making delivery of produce to a customer. When the accident happened, the process of unloading was in operation. It was a continuing process, including delivery, and could not be complete until all of the produce was delivered to the Inn. The accident happened while the unloading was being consummated. The facts show that the state action and the alleged injury are covered by the policy. Such a construction is consistent with both reason and justice, and is supported by Carl Ingalls Inc. v. Hartford Fire Ins. Co., 137 Cal. App. 741; Mutual Ins. Co. v. Hurni Co., 263 U. S. 167, 174.

Upon the issues presented I therefore find (1) that the United States District Court has jurisdiction under the Federal declaratory relief act to entertain this suit; (2) that this Court had jurisdiction to stay the trial of the action in the state court, and the preliminary injunction for that purpose was, under the circumstances, properly allowed by this Court; (3) that plaintiff did not waive its right to make a defense in this suit; and (4) that the state action and injury in question is covered by the policy.

Dated: September 11, 1939.

[Endorsed]: Filed Sept. 11, 1939. [40]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From the pleadings, evidence and stipulations of the parties hereto, the court finds the following to be the facts:

1. That plaintiff, Maryland Casualty Company, is now and was at all times mentioned in the complaint a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized and licensed to do business in the State of California, and having its principal place of business within the State of California in the City and County of San Francisco.

2. That at the time of the filing of the complaint herein, the defendant Mazilla Tighe was a citizen of the State of California, and resided in the County of Alameda in said state; that at the time of the filing of the complaint herein, the defendant Ah Chong was a citizen and subject of the Republic of China, and resided in the City and County of San Francisco, in the State of California; that at the time of the filing of the complaint herein, the defendant Leong Cheung was a citizen of the State of California, and resided in the City and County of San Francisco in said state.

3. That the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3000.00).

4. That this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial

Code, Section 274d, 28 U. S. C. A. Section 400). [41]

5. That on or about the 3rd day of April, 1937, plaintiff issued a policy of automobile insurance to defendant Ah Chong; That the policy period was from April 3, 1937, to April 3, 1938, and said policy was in effect during all of said period; that in said policy plaintiff agreed with defendant Ah Chong to pay on behalf of defendant Ah Chong, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums, not exceeding $5,000 for each person and not exceeding $10,000 for each accident, which defendant Ah Chong should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance and use of a certain automobile described in said policy as a 1929 Model Kleiber 1½ Ton Truck, M#16EC7717; that said policy further provided that the purposes for which said automobile was to be used were commercial and that use of said automobile for said purposes included the loading and unloading thereof; that a true copy of said policy is attached to the complaint herein, is marked Exhibit "A" and the same is made a part thereof.

6. That on or about the 25th day of January, 1938, defendant Mazilla Tighe commenced an action for damages against defendants Ah Chong and Leong Cheung in the Superior Court of the State

of California, in and for the City and County of San Francisco, entitled Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants, and numbered therein No. 278962; that in the complaint of said Mazilla Tighe, in said action said Mazilla Tighe alleged that on the 26th day of November, 1937, said Leong Cheung was an [42] employee of said Ah Chong and, while so employed, said Leong Cheung made a delivery of vegetable produce to a restaurant known as Piccadilly Inn and located in the 300 block of Sutter Street in San Francisco, from a delivery truck parked at the curb on said Sutter Street and opposite to, and about ten feet from, the entrance of said Piccadilly Inn; that at said time and place said Mazilla Tighe was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilly Inn; that at said time and place said Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: that after making a delivery to the aforesaid Piccadilly Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder, as he continued running forward, in a negligent and careless manner; that he ran toward the aforesaid truck at the curb, and in so doing collided with said Mazilla Tighe was knocked

violently to the sidewalk and was caused to sustain injuries as more particularly in said complaint appears; that as a result of said collision said Mazilla Tighe suffered injuries and loss of earning capacity, and incurred and will incur expense for medical and nursing attention, in the aggregate amount, to the date of filing said complaint, of $10,390; in said complaint said Mazilla Tighe prays for judgment against said Ah Chong and Leong Cheung, and each of them, as follows: For general damages in the sum of $10,000, for special damages incurred to date of filing said complaint in the sum of $390, for such further special damages as may be incurred subsequent to the date of filing said complaint, for costs of suit, and for such other and further relief as [43] to the Court may seem meet in the premises; that a true copy of said complaint is attached to the complaint herein, is marked Exhibit "B", and the same is made a part thereof.

7. That the facts as they are set out in the complaint heretofore referred to and designated as Exhibit "B" and as developed on the trial of this case indicates that the alleged accident and resulting injury, if any, occurred as the defendants were using this truck in making delivery of produce to a customer and while defendant Leong Cheung was returning to the truck to obtain further vegetables for delivery, and is within the coverage of the aforesaid policy hereinbefore designated as Exhibit "A".

8. That an actual controversy exists as between plaintiff and defendants herein, as follows: De-

fendants Ah Chong and Leong Cheung contend that since the automobile referred to in said complaint in said action brought by said Mazilla Tighe is the same automobile described in said insurance policy plaintiff herein has the obligation under said policy to defend said Ah Chong and Leong Cheung in said action; further, defendants Ah Chong, Leong Cheung and Mazilla Tighe contend that if it should be adjudged in said action that said Ah Chong and Leong Cheung have any liability to pay any sums to said Mazilla Tighe by reason of the alleged accident set forth in said complaint in said action, then plaintiff herein has the obligation under said policy to pay said sums to said Mazilla Tighe up to the aggregate amount of $5,000; on the other hand, plaintiff herein denies and controverts said contentions and each of them and on its part contends that although the automobile referred to in said complaint of said Mazilla Tighe is the same automobile described in said policy of insurance, plaintiff herein has no obligations or liability under said policy so far as said alleged accident is concerned because [44] said alleged accident did not arise out of the use of said automobile or the loading or unloading thereof; further plaintiff herein contends that it was released of all obligations and liability under said policy so far as said accident is concerned by reason of the failure of defendant Ah Chong to notify plaintiff that any such accident occurred for more than sixty days after it is alleged in said complaint the same occurred.

9. That the defendant Ah Chong requested plaintiff herein to defend in the name of and on behalf of defendants Ah Chong and Leong Cheung in the state action No. 278962, brought by Mazilla Tighe in the Superior Court of the State of California, in and for the City and County of San Francisco; that plaintiff herein assumed charge and control of the aforesaid action and did defend said action and did by and through its attorneys on the 17th day of February, 1938, in the office of the County Clerk of the Superior Court, file an answer to said complaint of Mazilla Tighe, in action No. 278962, on behalf of defendants Ah Chong and Leong Cheung; that plaintiff's consent to defend said action was subject to a reservation of rights as to defendant Ah Chong only.

10. That a declaratory judgment or decree herein is proper to determine the rights and other legal relations of the parties hereto in the manner set forth at length in Paragraph X of plaintiff's said complaint.

11. That within six days after the commencement of the said action in the said Superior Court the complaint in said action was delivered by said defendants Ah Chong and Leong Cheung to the plaintiff; that plaintiff, before undertaking the defense of said action did not, until or [45] before March 7, 1938, notify said defendants that it would undertake the defense of said action under the reservation of the rights to claim that its policy did

not cover the injury alleged and involved in the complaint in said action in the state court or that it had been relieved of liability under said policy by failure of the insured to give prompt notice of said accident, and then only the defendant Ah Chong was notified by the aforesaid letter from plaintiff to Ah Chong dated March 7, 1938, a copy of which is attached to the answer of defendants Ah Chong and Leong Cheung herein and marked Exhibit "1".

12. With regard to the accident involved in said action in the state court, the court finds that on the 26th day of November, 1937, the truck in question was parked against the curb on the opposite side of Sutter Street from Piccadilly Inn, and the said defendant Leong Cheung removed certain vegetables from said truck and carried them across Sutter Street and across the sidewalk thereof into said Piccadilly Inn, and there delivered and left the said vegetables. He then started to return to said truck for the purpose of obtaining further vegetables to deliver to the said Piccadilly Inn, and if the said plaintiff Leong Cheung collided at all with plaintiff Mazilla Tighe (which said plaintiff Leong Cheung denies) the collision happened as he emerged from said Piccadilly Inn for the purpose of obtaining further vegetables and before the unloading of vegetables for Piccadilly Inn from said truck had been completed.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the court finds and decides: [46]

1. That the defendants Ah Chong and Leong Cheung have not waived their rights under said policy by failure to give notice of said accident in accordance with the terms of said policy.

2. That this court has jurisdiction under the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A. Section 400) to entertain this suit.

3. That this court has jurisdiction to stay the trial of the action in the state court and the preliminary injunction for that purpose was, under the circumstances, properly allowed by this court.

4. That the cause of action alleged and involved in the complaint, according to the allegations of the complaint in the state court, and as developed on the trial of this case, occurred after certain vegetables had been delivered by defendant Leong Cheung from the truck and while he, Leong Cheung, was returning to the truck for another load to be delivered; and it appears from the evidence herein that if the alleged accident was at all caused by the insured, it occurred while the unloading was being consummated and before it had been completed and such an injury would be within the coverage of said policy.

5. That plaintiff take nothing by its said action and that defendants recover their costs of suit

herein and that the preliminary injunction issued herein be dissolved.

Let judgment be entered accordingly.

Dated: This 24th day of November, 1939.

A. F. ST. SURE
District Judge

Copies mailed to
Treadwell & Laughlin
Charles B. Morris [47]

Received a copy of the within Amended Findings, etc., this 22nd day of November, 1939.

TREADWELL & LAUGHLIN
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 24, 1939. [48]

[Title of District Court and Cause.]

ORDER AMENDING FINDINGS

The motion of the plaintiff to amend the Findings on file herein came on regularly for hearing this day, Edward F. Treadwell, Esq., appearing on behalf of plaintiff, and Charles B. Morris, Esq., appearing on behalf of the defendants Ah Chong and Leong Cheung, and Messrs. Young & Ryan appearing for the defendant Mazilla Tighe, and said matter having been argued by counsel and submitted to the court, and the court being now fully advised in the premises,

It Is Hereby Ordered:

1. Paragraph 9 of said Findings is hereby amended to read as follows:

> "9. That the defendant Ah Chong requested plaintiff herein to defend in the name of and on behalf of defendants Ah Chong and Leong Cheung in the state action No. 278962, [49] brought by Mazilla Tighe in the Superior Court of the State of California, in and for the City and County of San Francisco; that plaintiff herein assumed charge and control of the aforesaid action and did defend said action and did by and through its attorneys, on the 17th day of February, 1938, in the office of the County Clerk of the Superior Court, file an answer to said complaint of Mazilla Tighe, in action No. 278962, on behalf of Defendants Ah Chong and Leong Cheung."

2. Paragraph 11 of said Findings is hereby amended to read as follows:

> "11. That plaintiff at no time prior to the commencement of this action for declaratory relief waived its right to claim that said policy did not cover the said accident, and the said plaintiff had not by its conduct or otherwise waived its right to defend against liability on the ground that said accident was not covered by said policy."

Dated: January 8, 1940.

A. F. ST. SURE
District Judge

Approved as to form.

TREADWELL & LAUGHLIN
EDWARD F. TREADWELL
Attorneys for Plaintiff
CHARLES B. MORRIS
Attorneys for Defendants
Ah Chong and Leong Cheung
YOUNG & RYAN
Attorneys for Defendant
Mazilla Tighe

[Endorsed]: Filed Jan. 19, 1940. [50]

In the District Court of the United States in and for the Northern District of California, Southern Division.

Equity No. 4279S

MARYLAND CASUALTY COMPANY,
a corporation,

Plaintiff,

vs.

MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,

Defendants.

JUDGMENT

In the above entitled action the defendants Ah Chong and Leong Cheung appeared and answered by their attorney, Charles B. Morris, and the de-

fendant Mazilla Tighe appeared and answered by her attorneys, Young & Ryan, and the said cause having come on regularly for trial before Hon. A. F. St. Sure, and evidence oral and documentary having been introduced and said cause argued and submitted to the court and the court having filed its findings of fact and conclusions of law and being now fully advised in the premises,

It Is By the Court Here Considered Ordered, Adjudged and Decreed:

1. That the defendants Ah Chong and Leong Cheung have not waived their rights under said policy by failure to give notice of said accident in accordance with the terms of said policy.

2. That this court has jurisdiction under the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A. Section 400) to entertain this suit.

3. That this court has jurisdiction to stay the trial of the action in the state court and the preliminary injunction for that purpose was, under the circumstances, [51] properly allowed by this court.

4. That the cause of action alleged and involved in the complaint, according to the allegations of the complaint in the state court, and as they developed in the trial of this case, occurred after certain vegetables had been removed from the truck and delivered, but it appears by the evidence here that, if the accident was at all caused by the insured, it was caused while the said Leong Cheung was returning to the truck to obtain from said truck further vege-

tables for delivery to the said Piccadilly Inn, and that such state action and injury would be and is within the coverage of said policy.

5. That plaintiff take nothing by its said action and that defendants have and recover from the plaintiff their costs of suit taxed at the sum of $....., and that the preliminary injunction issued herein be and the same hereby is dissolved.

Dated: November 24, 1939.

A. F. ST. SURE
District Judge.

Received a copy of the within Judgment this 22nd day of November, 1939.

TREADWELL & LAUGHLIN
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 24, 1939. [52]

REPORTER'S TRANSCRIPT

Tuesday, March 28, 1939

(TESTIMONY)

APPEARANCES

For Plaintiff: Edward F. Treadwell, Esq.

For Defendants: Messrs. Young & Ryan, and Charles B. Morris, Esq. [54]

Tuesday, March 28, 1939

Mr. Treadwell: If your Honor please, this is an action, as your Honor learned on the pretrial con-

ference, for declaratory relief; and, as incidental to the prayer for declaratory relief, it is also asking for an injunction against the prosecution of an action in the state court.

The action involves an automobile policy, your Honor; and the provisions of the policy which are material are quite short. The first paragraph (a) reads:

> "The term 'pleasure and business' is defined as personal, pleasure, family and business use. (b) The term 'commercial' is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named insured's business or occupation as expressed in Item 1. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof."

The other provision is on page 2, under the heading of, "I Coverage A—Bodily Injury Liability." It reads:

> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

"Coverage B—Property Damage Liability.

"To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the [55] automobile."

The particular accident, your Honor, which is involved in this case and in the state court, is alleged in the complaint and admitted by the answer; I have the answer here; and it is set forth, in paragraph VI of the complaint here, reciting the allegations of the complaint in the state court:

"That on or about the 25th day of January, 1938, defendant Mazilla Tighe commenced an action for damages against defendants Ah Chong and Leong Cheung in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants, and numbered therein No. 278962; that in the complaint of said Mazilla Tighe in said action said Mazilla Tighe alleged that on the 26th day of November, 1937, said Leong Cheung was an employee of said Ah Chong and, while so employed, said Leong Cheung made a delivery of

vegetable produce to a restaurant known as Piccadilly Inn and located in the 300 block in Sutter Street in San Francisco, from a delivery truck parked at the curb on said Sutter Street and opposite to, and about ten feet from, the entrance to said Piccadilly Inn; that at said time and place said Mazilla Tighe was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilly Inn; that at said time and place said Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: that after making a delivery to the aforesaid Piccadilly Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder as he continued running forward, in a negligent and careless manner; that he ran toward the aforesaid truck at the curb, and in so doing collided with said Mazilla [56] Tighe as she walked along the aforesaid sidewalk, with such force and effect that said Mazilla Tighe was knocked violently to the sidewalk and was caused to sustain injuries as more particularly in said complaint appears——"

That such accident did not arise out of the use, operation or ownership of the automobile or truck, and was not connected with the loading or unloading thereof.

Now, your Honor, the facts in the case are practically, with one exception, stipulated to. The accident is alleged to have occurred on the 26th day of November, 1937; and the complaint was filed in the state court by Mazilla Tighe on January 25, 1938. On January 31, 1938, the Maryland Casualty Company received notice of the action by the complaint and summons served on the assured and his employee, being brought to the offices of the company. That was the first notice, your Honor, that the Maryland Casualty Company ever received of the accident. I have not read the provision of the policy, your Honor, in regard to notice; but it provides, as I remember it, for notice as soon as practicable after the accident.

We will show, your Honor, from that time the Maryland Casualty Company consulted its main office, and was directed to defend the action, but to reserve all rights, claiming that it was released by lack of notice, and that it was not within the coverage of the policy.

On February 17th, an answer was filed, through the Insurance Company; but, at that time, both of the parties, the assured and his employee, were informed that it was reserving the right and claiming that it was not covered by the policy, and that it had been released; and this was followed up, your Honor, on March 7th, by written letter making a record of the fact that they had been so informed and informing them that the Surety Company was [57] proceeding, reserving all rights, and particu-

larly that the matter was not covered by the policy, and that it had been released by lack of notice.

That is all the opening statement that we desire to make. We want to put in very little evidence. If counsel wishes to make a statement at this time, he may; or we will put in our evidence.

Mr. Ryan: May it please your Honor, I represent Mazilla Tighe, the plaintiff in the Superior Court action; and I wish at this time to raise only the following points which were already outlined, I believe, in the pretrial conference: the first one being that, under the provisions of the Judicial Code, 274d, this Court has no jurisdiction to entertain declaratory relief.

The second point I wish to raise at this time is that, under Section 265 of the Judicial Code, the Court was in error in allowing an injunction to issue in this case, staying the proceedings in the state court.

And, lastly, there has been such an appearance in this case that the plaintiff, Maryland Casualty Company, if they had any rights previously, they have waived the same. I believe Mr. Morris, who represents Ah Chong, will argue that point.

Lastly, that, under the terms of the policy itself, if it goes to the merits, the Chinaman, I believe, was adequately covered within the provisions of the automobile policy that they have already set out.

Now, with reference to the first point, I wish to make a few short statements relative to the jurisdictional point and the injunction point——

The Court: I understand the evidence will be very brief, Mr. Ryan?

Mr. Ryan: Yes, the evidence will be very brief.

The Court: Might it not be better to proceed with the introduction of the evidence; and, after the evidence is all in, I will [58] listen to your argument?

Mr. Ryan: That will be perfectly satisfactory.

Mr. Morris: Will that go for my argument, also?

The Court: Yes.

EARL C. BERGER,

called for the plaintiff; sworn.

Direct Examination

Mr. Treadwell: Q. What is your business, Mr. Berger? A. I am an attorney.

Q. Do you live in San Francisco? A. Yes.

Q. Were you ever connected with the Maryland Casualty Company?

A. I was; but I am no longer.

Q. In what capacity were you connected with the Company? A. As an attorney and an adjuster.

Q. Do you remember the occasion when the complaints were brought to the Company in this case of Mazilla Tighe against two Chinamen,—Ah Chong and Leong Cheung?

A. Yes, I remember the complaint coming in and its being assigned to me, the day it came in.

The Court: You are referring now to the Superior Court action?

(Testimony of Earl C. Berger.)

Mr. Treadwell: Yes.

The Court: What is the number of it?

Mr. Treadwell: The number of that action is 278962.

Q. Had the Company received any notice of the accident before these complaints were brought in?

Mr. Morris: I object to that, if your Honor please, as to what the Company had received, as it is what he knows.

The Court: Objection sustained, as the witness testified that the complaints and summons were brought to him. [59]

Mr. Treadwell: Q. Can you tell when it was the complaint and summons were brought to your office, Mr. Berger? A. The date?

Q. Yes.

A. Well, I would have to refresh my memory.

Q. I show you a file.

A. I recognize this as being the file.

Q. Now, refreshing your memory from that, will you state when those complaints were brought in?

A. According to the notation, I received the summons and complaint—by that, I mean it came to our office, on January 31, 1938.

Q. And, so far as your own knowledge is concerned, at the time you received it, had you heard anything about the accident before the summons and complaint were brought to your office?

A. No. This was the first notice the office of the

(Testimony of Earl C. Berger.)

Company received of any accident or anything pertaining to the matter at all,—the very first notice.

Q. Now, upon receiving that, did you communicate with the home office of the Company?

A. Yes, sir.

Q. Did you receive from the home office this letter, which I show you, dated February 12, 1938?

Mr. Morris: I object to that, your Honor, as self-serving.

Mr. Treadwell: I am not offering it yet. I am just asking if he received it.

The Court: Overruled.

The Witness: A. Yes, I recognize it as a reply to my communication to the home office.

Mr. Treadwell: Have you seen this?

Mr. Morris: No.

Mr. Treadwell: I offer this letter in evidence, your Honor, as a part of the examination of the witness.

Mr. Morris: If your Honor please, the defendant Ah Chong objects to the introduction of this letter, on the ground that it is self-serving, not binding upon him.

The Court: I have not seen the letter. [60]

Mr. Ryan: I join in that objection, on the part of Ah Chong, that it is not binding; immaterial, irrelevant and incompetent.

The Court: Read the letter.

(Testimony of Earl C. Berger.)

Mr. Treadwell:

(PLAINTIFF'S EXHIBIT No. 1)

"Maryland Casualty Company Air Mail to San Francisco Claim Division. Date: February 12, 1938. From Claim Division. H. O. File No. 58848-0-38-Auto.

Subject Ah Chong Mazilla Tighe.

"We have your report of investigation, copy of the bill of complaint, which crossed my letter of February 8 to you.

"This is a rather peculiar case, but we do note that the plaintiff's attorney has entered 'John Doe, defendant,' which would leave him the privilege of bringing in either the city or the owner of the restaurant, by an amended complaint.

"It is also noted that mention of the assured's truck is made in this complaint, and, pending further thought and discussion in the matter, we are suggesting that you accept this case under a reservation of rights and enter appearance.

"We know that in the meantime you will use every effort in an endeavor to locate other witnesses.

J. P. CALHOUN,
Supervisor."

The Court: You are offering it for what purpose?

Mr. Treadwell: We are offering it for the pur-

(Testimony of Earl C. Berger.)

pose of showing the authority of this witness to do what he did, namely, to communicate this fact to the defendants.

The Court: Objection overruled.

(The letter was marked "Plaintiff's Exhibit No. 1.")

Mr. Treadwell: Q. Now, upon receiving that air mail letter of February 12th, did you have any talk with Ah Chong and Leong Cheung, before or at the time that the answer was prepared?

A. Yes, I spoke to both of them. I was the one who raised the question of coverage; that is, I initiated the question and consulted with my home office, because it struck me the automobile policy did not [61] cover the situation, and it was the subject matter of the complaint in the Superior Court. I explained to Mr. Ah Chong and to his employee, Mr. Leong Cheung, that, in my opinion, there was no coverage for this type of complaint. I must admit that I had some difficulty in explaining the matter to them; and I told them that the very best I could do would be to recommend to the Company that we handle the defense, reserving all rights, as a matter of courtesy to them. I took his statement as to the facts concerning the accident; and, in fact, I took the statements of both men, and made it very clear to them that, in what I was doing, we were not assuming——

Mr. Ryan: I wish to object to this line of testimony as being incompetent, and irrelevant, and not

(Testimony of Earl C. Berger.)

binding on Mazilla Tighe, and being strictly self-serving. Ah Chong is not a party to this action, so far as Mazilla Tighe is concerned; she cannot be bound by the testimony.

The Court: I think that objection is good.

Mr. Treadwell: We do not think that, under the authorities, you have to do more than notify the assured.

The Court: How do you mean?

Mr. Treadwell: We are defending him; and, in defending him, we have the right, under the authorities, to notify him that our defense is with a full reservation of rights; and, if we did that, then we have not waived anything. They are pleading here that, by defending, we waived our rights.

The Court: The objection is overruled.

Mr. Treadwell: Q. You may proceed.

A. I explained to the two men that our undertaking to interpose an answer was without prejudice on our part; that, in the event any judgment was rendered against them, the Company would not pay it; the only thing we would do would be to give them as good a defense as we would if there were coverage, and that we would not charge any attorney's [62] fees; but, beyond that, we could not go. I asked Mr. Ah Chong if he had any son or relative who might understand English better; he said he would have his broker get in touch with me; Mr. Wright, his broker, did get in touch with me, and I explained the matter to him. Then, after that, I fol-

(Testimony of Earl C. Berger.)

lowed it up with a letter explaining our position in the matter.

Mr. Treadwell: It is stipulated, your Honor, that that letter which is attached to the answer might be read without further proof; and I now offer it in evidence, being Defendants' Exhibit 1, attached to the answer of Ah Chong and Leong Cheung.

"Maryland Casualty Company; Silliman Evans, Chairman of the Board; Edward J. Bond, Jr., President. San Francisco Claim Division, 210 Sansome Street, San Francisco, Calif. Geo. W. Ecrement, Jr., Mgr. Donald Seibert, Attorney. 58848-0-38-Auto Ah Chong.

BI-Mazilla Tighe March 7, 1938

"Mr. Ah Chong

"128 Oregon Street

"San Francisco, California

"Dear Sir:

"We have heretofore received from you a copy of Summons and Complaint, served upon you in an action commenced against you and your employee, Leong Chong, by Mazilla Tighe, in the Superior Court of the State of California, in and for the City and County of San Francisco, to recover damages in the sum of $10,390.00, and costs, for personal injuries alleged to have been sustained by the said Mazilla Tighe, as a result of an accident which occurred on or about November 26, 1937. We have ac-

(Testimony of Earl C. Berger.)

cepted the defense of this action under a complete reservation of our rights, because of late notice to us of the accident, and for the other reasons herein stated.

"It appears that the accident in question occurred on or about November 26, 1937, but we were not notified of same until at [63] least January 31, 1938, and as a result we have been prejudiced in any handling of this matter.

"As you are familiar, our policy, #15-537989 covers automobile accidents, and it appears that the accident in question is not such an accident as contemplated by the policy, as it does not appear that the injuries claimed by the claimant were sustained as a result of the operation of your automobile.

"It is also to be noted that whereas damages sought by the plaintiff are in the sum of $10,390.00, plus costs, our liability under the terms of the policy above-mentioned is limited to the sum of $5,000.00. In the event that it appears that this company is liable under the terms of the policy, such liability, of course, is limited to the sum of $5,000.00, and any part of a judgment which might be rendered in the pending suit in excess of that sum will, therefore, have to be paid by you.

"We are appearing in this case on your behalf through our attorney, Donald Seibert, of 210 Sansome Street, San Francisco, who will

(Testimony of Earl C. Berger.)

represent you at the trial and defend the action without expense to yourself; but we are writing you at this time to advise you that, in view of your excess interest above-mentioned, you may, if you so desire, associate your own attorney with ours in the defense of the suit, it being understood, of course, that this will be done at your own expense.

"We kindly request you to acknowledge receipt of this letter on the enclosed carbon copy thereof, which we ask you to return to this office as soon as possible.

"Very truly yours,

"GEO. W. ECREMENT, JR.,
Mgr.,

"per (signed) EARL C. BERGER,
Adjuster."

Q. Mr. Seibert: Was he your superior there?

A. Yes; he was attorney of record. There were several attorneys under him. I sent that letter.

Q. You sent that letter?

A. Yes; I had charge of the thing. Mr. [64] Seibert did not see many matters.

Mr. Treadwell: That is all.

Cross Examination

Mr. Ryan: Q. Mr. Berger, I show you this letter dated March 4, 1938, addressed to Young & Ryan, 1106 Broadway, Oakland, in which you requested the deposition of Mrs. Tighe. Is that right?

(Testimony of Earl C. Berger.)

A. Certainly.

Q. You wrote this letter?

A. After having spoken to you over the phone, Mr. Ryan.

Q. You took the deposition of Mazilla Tighe, did you not? A. Yes, sir.

Q. You did so as a representative of Mr. Seibert and the Maryland Casualty Company, when you did that?

A. No; I took it as a representative of the two defendants.

Mr. Treadwell: Do you want to read that letter in evidence?

Mr. Ryan: This is a letter on the printed form of Donald Seibert, attorney, 5th floor, 206 Sansome Street, San Francisco, Cal. March fourth, 1938:

DEFENDANTS' EXHIBIT A

"Young & Ryan, Esqs.,
"1106 Broadway,
"Oakland, Calif.

Re. Tighe vs. Chong

"Gentlemen:

"This will confirm our phone conversation of today relative to the taking of the deposition of the defendant Chong in the offices of Freed & Freed in the Mills Building, at 2:30 p. m. on Tuesday, March 8th 1938.

"In the meanwhile I would thank you to advise whether we cannot take the plaintiff's

(Testimony of Earl C. Berger.)

deposition at the same time and place inasmuch as it was our intention to move for same.

"With appreciation for your kind advices, I am

"Yours very truly,

"DONALD SEIBERT,

"per EARL C. BERGER." [65]

I would like to have that introduced in evidence.

(Letter marked "Defendants' Exhibit A.")

Mr. Ryan: Q. Pursuant to that, you did take the deposition?

A. Yes, I took the deposition; and, as I stated, Mr. Ryan, as representing the defendants, not the Company or Mr. Seibert.

Q. You at no time apprised me of that fact, did you?

A. I believe I did, when I requested you for a stipulation extending the time to either answer the complaint or demur or make a motion with relation to the complaint. I believe I did acquaint you with that fact.

Q. Did you put in the answer to the complaint in the state court?

A. Did I put the answer in?

Q. Yes. You drew the answer and filed it, didn't you? A. Yes.

Q. You also paid the filing fee of two dollars in the state court?

A. Well, I filed it. I could not tell you the date.

(Testimony of Earl C. Berger.)

Whatever date appears in the answer is probably the proper date.

Mr. Treadwell: It will be stipulated that was filed February 17, 1939.

Mr. Ryan: I think that is correct: February 17th. That is all.

Cross Examination

Mr. Morris: Q. You received the summons and complaint in the state court action brought by Mazilla Tighe against Ah Chong and Leong Cheung —you put the date around January 31st?

A. January 31st.

Q. After you had received those papers, did you have any conversation with Leong Cheung or Ah Chong? A. With both.

Q. How soon afterwards?

A. I cannot tell you exactly; but it might have been a day or two.

Q. Did you tell them, at that time, that you were handling the matter under reservation of rights?

A. Yes, I did. I did [66] not use those very words, because I did not think they would understand those words; but I used simpler words, explained to them that an automobile policy would not cover this type of complaint any more than a fire insurance policy would cover it.

Q. Where was that conversation.

A. At 210 Sansome Street, my office.

Q. Was anybody with them, or were they alone?

(Testimony of Earl C. Berger.)

A. The two men came in together. It was a room with five desks in it, and I was in there and other men were in there; but I do not believe they heard the conversation; they were attending to their own business.

Q. Did they come in alone?

A. The two of them did, yes; and then I had Mr. Leong Cheung in the office twice after that.

Q. Leong Cheung? A. Yes.

Q. That is the younger man that was the driver, is it not, when you speak of "Leong Cheung"?

A. Well, after speaking to Mr. Ah Chong,—that is, the employer,—I told them that they had better get somebody who understod the situation a little better, and he had Mr. Wright get in touch with me, and I then explained to Mr. Wright what was required.

Q. What was the date of the conversation, if you know, when you had the talk with Mr. Ah Chong and advised him to get somebody who understood that?

A. Well, I am certain it was prior to the filing of the answer; prior to the drawing of the answer. I could not give you the exact date.

Q. That was some time before February 17th, the date you filed your answer? A. Yes.

Q. Was it before you had communicated with your home office?

A. Yes. I was in touch with them again after that.

(Testimony of Earl C. Berger.)

The Court: Q. Was it before you communicated with your home office?

A. It was before the filing of the answer that I had communicated with the men. [67]

Mr. Morris: Q. Now, Mr. Berger, why did you try to tell Ah Chong, the first time you talked to him, about this policy?

A. In my opinion, after reading the complaint and after speaking to the men, in getting their version of what had happened, that that occurrence or happening was not such as would be covered by the automobile policy in question; that they would have to get their own attorney. That is when I sent Mr. Ah Chong to Mr. Wright and asked him to have someone get in touch with me in order that I could discuss the matter more intelligently.

Q. Why did you do that; why did you send for Mr. Wright?

A. I did not send him directly to Mr. Wright; it was my idea that Mr. Wright spoke Chinese.

Q. Your impression was that Ah Chong did not know what you were talking about; is that right?

A. No; I believe he understood what I explained to him, but I think he was in a quandary. He said to me, "Well, I have insurance"; and he thought it covered any possible situation. I knew that Mr. Wright was his direct representative, as Mr. Wright is very friendly with many Chinese people and is considered a leader in Chinatown, and that perhaps Mr. Wright's explanation would carry more weight

(Testimony of Earl C. Berger.)

than I would, because I was a total stranger to the man.

Q. Now, you say you told him he ought to get his own attorney? A. Yes, sir.

Q. Did he get an attorney?

A. No; he had Mr. Wright communicate with me; and then I explained it to Mr. Wright; and Mr. Wright asked me if I could not do something about the matter; and I said, "Well, I will try to handle this thing, under reservation of rights, give him a defense, but not assume the payment of any judgment."

Q. When was that; about what time?

A. Before we put in the answer. [68]

Q. That was a verbal conversation with Mr. Wright, was it?

A. Yes; but that was subsequent to my conversation with both defendants.

Q. Now, you wrote to your home office; and when was it that you received your letter from the home office?

A. The reply from the home office is dated February 12th, and was received at our office three days later, the 15th of February.

Q. Now, upon receipt of this letter dated February 12th from your home office, what did you do, with respect to this reservation of rights?

A. I told the defendants to sign the answer; but, before having them sign the answer, I reiterated my position and said that the Company was willing to handle it, under this reservation of rights.

(Testimony of Earl C. Berger.)

Q. You wrote a letter, didn't you, on March 7th?

A. Yes.

Q. Why did you delay writing that letter until March 7th?

A. I don't know whether it would be called a "delay"; it was simply to go on record as to the oral understanding, to make the oral understanding more binding.

Q. Was there any doubt in your mind, when you dictated this letter of March 7th, that you had not made your position clear with Ah Chong?

A. No. There was no doubt in my mind. It was a matter of complying with regular practice in the office that I wrote that letter.

Q. Why didn't you write it earlier?

A. I didn't think that it would be needed, because it was so obvious that that type of case would not be covered by the automobile policy; that anyone, no matter how poor his English, would understand that; and I explained that to him, and I explained it to Mr. Wright, and they were satisfied with my explanation, so far as I could make out.

Q. Now, Mr. Berger, following your letter of March 7th, your Company continued to further the defense, did they not?

A. Yes; [69] they took the deposition.

Q. While you were still continuing the defense, there had been no substitution of attorneys?

A. Certainly not; because they never objected to anything; they understood what our position was—

(Testimony of Earl C. Berger.)

Mr. Morris: I object to what they understood.

The Court: That goes out.

The Witness: I will give you my impression about the substitution of attorneys——

Mr. Morris: Q. There has never been any substitution of attorneys up to date, has there?

A. No.

Q. And Mr. Seibert is still the attorney of record for Ah Chong and Leong Cheung, is he not?

A. Today?

Q. Yes. A. I don't know.

The Court: Q. You say that Mr. Siebert is the attorney of record for the defendants Ah Chong and Leong Cheung?

Mr. Morris: In the state court.

The Court: Q. In the state court?

A. Yes, in the state court.

Q. Did you ever get an acknowledgment of the letter of March 7th that you wrote to Ah Chong?

A. An oral acknowledgment, not one in writing.

Q. Whom did you get the oral acknowledgment from?

A. I got the oral acknowledgment from Mr. Wright.

Q. Did you ever write a letter to Leong Cheung?

A. I think I wrote to both of them.

Q. I will show you your letter,—the original. Can you tell, from that letter, whether you wrote to Ah Chong or Leong Cheung?

(Testimony of Earl C. Berger.)

A. This letter addressed, obviously, to Mr. Ah Chong—If I look through the file, I may find one addressed to Mr. Leong Cheung; I don't know.

Mr. Treadwell: We do not find any in the file.

The Witness: Well, I cannot say for certain; but it was my [70] impression that I had addressed both men.

Mr. Morris: That is all, Mr. Berger.

Mr. Treadwell: That is all. Now, if your Honor please, at the pretrial conference, it was agreed that any question of the incorporation of the plaintiff or its qualifications to do business here would be waived on the trial. You do withdraw any defense of that kind?

Mr. Morris: I have never raised it.

Mr. Ryan: Yes.

Mr. Treadwell: I think it was made clear, from what counsel read there, that the deposition was to be taken and was taken on March 8, 1938.

Mr. Ryan: That is correct,—by Mr. Berger, who took it at the instance of Mr. Donald Seibert, who was, at that time, attorney for the Maryland Casualty Company. Donald Seibert's office was with the Maryland Casualty Company. They put the answer in.

Mr. Treadwell: He was one of their employees as well as their attorney, and he put in an answer for the defendants,—the two Chinamen.

Mr. Ryan: Mr. Seibert is still the attorney of record in the state court; is that correct?

Mr. Treadwell: Yes, that is my understanding of it.

Mr. Ryan: Is he still with the Maryland Casualty Company?

Mr. Treadwell: He is still with them. That is all we wish to offer, your Honor.

Mr. Morris: If your Honor please, I would like to recall Mr. Berger just to put this letter in evidence, which I referred to, which is attached to the answer.

The Court: It has been read in evidence. [71]

WENTWORTH S. WRIGHT,

called for defendant Ah Chong; sworn.

Direct Examination

Mr. Morris: Q. Mr. Wright, what is your business?

A. I am an insurance broker.

Q. Are you acquainted with Ah Chong?

A. Yes, sir.

Q. And Leong Cheung? A. Yes.

Q. Have you business relations with them?

A. I am their insurance broker.

Q. You are their insurance broker?

A. Yes.

Q. And was it through you that this insurance that is involved in this case was placed with the Maryland Casualty Company? A. Yes.

(Testimony of Wentworth S. Wright.)

Q. Now, Mr. Wright, do you recall the occasion when the suit was filed by Mazilla Tighe against Ah Chong and Leong Cheung? A. Yes.

Q. Were those papers ever in your possession?

A. Yes; they were brought to my office.

Q. Who brought them to your office?

A. Ah Chong.

Q. What did you do with them?

A. I phoned to the Maryland Casualty Company and asked them to send an adjuster over, who took a statement on the part of the claim, in my office.

Q. Where was that?

A. 519 California Street.

Q. Who was present at that time?

A. Ah Chong and Leong Cheung and the adjuster—I have forgotten his name.

Q. Was it this gentleman: Mr. Berger?

A. I don't think so.

Q. Now, was anything said there about a reservation of rights?

A. Nothing at all; there was no mention made that the claim was not a claim under the policy.

The Court: Q. At any time?

A. Well, the first time was about either a day or two days before that letter of reservation of rights was sent. At that time, an adjuster from the Maryland Casualty Company called at my office personally and advised me that they were going to send such a letter; and I talked to him for more than [72] two hours, as vigorously protesting as I could any such act on their part.

(Testimony of Wentworth S. Wright.)

Mr. Morris: Q. Mr. Wright, prior to this occasion that you have just referred to, a few days before they wrote the letter—You are referring now to the letter of March 7th?

A. I am referring to the letter of reservation of rights; I do not recall the date.

Q. I will show you the letter and will ask you if you recognize the letter as one you are referring to.

A. This is the letter.

Q. It was two days before that, that the adjuster informed you they were going to write you such a letter?

A. It was either the day before or two days before.

The Court: Q. Was that the first time you ever heard anything about reservation of rights?

A. The first mention made to me that the Company was.

Mr. Morris: Q. Were you ever present when anything was said to Ah Chong or Leong Cheung about reservation of rights?

A. Not to my knowledge; at that time, there had never been anything said.

Mr. Morris: That is all.

Cross Examination

Mr. Treadwell: Q. Mr. Wright, do you know the name of the adjuster who came over immediately after the complaint was put in your hands?

A. No; I said I did not remember his name.

(Testimony of Wentworth S. Wright.)

Q. The second time that an adjuster came to your office and you had this talk with him, who was that?

A. I am not sure; I think it was Mr. Moore.

Q. Mr. Moore? A. Yes.

Q. As soon as the complaint was filed, I take it that the two Chinamen brought it into your office?

A. Yes, sir.

Q. Did they tell you, after that, that they had been up to the [73] office and had a talk with Mr. Berger? A. I do not recall.

Q. You do not recall? A. No.

Q. Did you go to Mr. Berger's office and have a talk with him? A. No.

Q. You never had any talk, referring to this case, with Mr. Berger?

A. After that letter of reservation of rights was sent out, I talked to Mr. Berger; and in no uncertain form.

Q. Didn't you go up, before that, and have a talk with Mr. Berger? A. No.

Q. Didn't the Chinamen tell you that they had been to Mr. Berger and had a talk with him?

A. I said I did not recall.

Q. You do not recall that at all? A. No.

Q. Didn't they tell you that there was some trouble regarding the matter? A. No.

Q. Nothing at all? A. No.

Q. A couple of days, you think, either a day or two days, before this letter was written, some-

(Testimony of Wentworth S. Wright.)

body did come in, you think his name was Mr. Moore, and tell you about this? A. Yes.

Q. That was the first time you had heard of this; is that right? A. That is right.

Q. Do these Chinamen talk pretty good English?

A. I would not say "pretty good," but good enough so that I could understand them.

Q. Well, I mean, didn't they talk so that people generally could understand them?

A. I do not think so—the younger man does.

Q. The younger man. How old a man was he?

A. He was about 22 and 23.

Q. Born in this country?

A. I don't know as to that.

Q. How long have you known him?

A. I never knew the younger man until he came in on this case.

Q. You have known him since then?

A. Yes. [74]

Q. He understand English fairly well, does he?

A. Fairly well.

Q. Now, then, how did you come to get this letter?

A. As soon as Ah Chong got it, he brought it down to me.

Q. Did you talk to him about it?

A. There was not very much occasion to talk to him about it; he had received it; and I talked to the Maryland Casualty Company about it.

Mr. Treadwell: I think that is all.

AH CHONG,

called for the defendants; sworn.

Direct Examination.

Mr. Morris: Q. What is your name?

A. Ah Chong.

Q. Where do you live?

A. I live 128 Oregon Street.

Q. When the two papers were given you, what did you do with them?

A. Well, I took the paper and gave it to Mr. Wright.

Q. You gave it to Mr. Wright?

A. Yes, sir.

Q. Did you go to the Maryland Casualty Company's office after that—after you gave the paper to Mr. Wright?

A. No; somebody get a letter for me—a paper.

Q. Did you go to the Insurance Company's office after you got the paper? A. No.

Mr. Morris: If your Honor please, I have had some difficulty conversing with this man, and I called up the United States Attorney's office last night, and they gave me the name of an interpreter; and I have asked him to be present, and he is present in court.

The Court: Q. Were you born here?

A. No; born in China.

Q. How long have you been here?

A. I come here 1915.

(Testimony of Ah Chong.)

The Court: I think he can understand; he speaks plainly.

Mr. Morris: Q. Did you ever see that man before (pointing to Mr. Berger)? A. I see him before.

Q. Where did you see him?

A. Somebody give me a paper and I [75] go to see him, with Mr. Wright.

Q. Was Mr. Wright with you? A. Yes.

Q. Did you ever go there without Mr. Wright?

A. Mr. Wright take me there.

Q. Mr. Wright took you there; is that right?

A. Yes.

Q. Where was it you saw him; what office?

A. Company; I don't know the number.

Q. Was it at the Insurance Company's office or at Mr. Wright's office?

A. Mr. Wright asked me to go to see the Company. I depended on Mr. Wright.

Q. What did you have with you?

A. Somebody give me a paper; I don't know what it is; I don't know.

The Court: Q. A letter?

A. No; a paper. I gave it to Mr. Wright.

Q. You gave it to Mr. Wright?

A. Yes, sir.

Q. Now, had you ever been to the Maryland Casualty Company's office before you got that letter? A. No; I don't know him before.

(Testimony of Ah Chong.)

Q. Never saw him before? A. No.

Q. Had you ever been up to their offices,—the Maryland Casualty Company's office?

A. No; I had never been there; I go with Mr. Wright; I depended on Mr. Wright.

Q. You depended on Mr. Wright?

A. Yes, sir.

Q. You did not go up there, yourself?

A. No; I did not go, myself.

Q. When was the first time you heard that this woman claimed your boy hurt her?

A. Well, he came to my house to see me; I don't know how he found out where I was.

Q. What did he say first?

A. Well, he gave me paper.

Q. He gave you a paper?

A. I don't know what you call it—a piece of paper. [76]

Q. What did you do with the paper?

A. He told me to go and see a lawyer.

Q. Did you ever hear of any accident before that? A. No.

Mr. Morris: That is all.

Cross Examination

Mr. Treadwell: Q. When you got that paper that they gave you at your house, what did you do with it? A. I took it to Mr. Wright.

Q. How soon after that did you go to the Insurance Company's office?

A. The next day I go to see Mr. Wright, and Mr. Wright said he go see the Company.

(Testimony of Ah Chong.)

Q. How many days after the paper was given to you did you and Mr. Wright go to the Insurance Company? A. He said go right away.

Q. Whom did you see in the Insurance Company? When you went to the Insurance Company, did you see Mr. Berger?

A. Yes, I saw him.

Q. How many times did you go to Mr. Berger's office altogether?

A. I can't remember how many times—two times.

Q. Two times? A. Yes.

Q. As many as three times?

A. I am not sure.

Q. You cannot remember how many times you went there? A. No.

Q. You went there once with Mr. Wright; you went to see Mr. Berger, you say, with Mr. Wright, once? A. One time.

Q. Then there were two times more?

A. The second time, I don't remember Mr. Wright there.

Q. You don't remember whether Mr. Wright was there the second time?

A. I think it was two; but I can't remember.

Q. You only remember once that Mr. Wright was with you? A. The first time, yes.

Mr. Morris: Q. Did anybody ever tell you your policy did not insure you—your insurance—you had no insurance? [77]

LEONG CHEUNG,

called for the defendants; sworn.

The Court: Q. How old are you?

A. I am 20, now.

Q. How long do you live in California?

A. I been here all the time, all my life.

Q. Born here? A. Yes, sir.

Direct Examination

Mr. Morris: Q. You drive Ah Chong's truck?

A. No; I do not drive truck; I am the helper.

Q. You are the helper on the truck?

A. Yes, sir.

Q. Were you helper on the truck in 1937?

A. Yes, sir.

Q. Do you remember the day you stopped at Piccadilly Inn on Sutter Street? A. Yes, sir.

Q. Did you see the lady, Mrs. Tighe, near Piccadilly Inn on that occasion? A. Yes.

Mr. Ryan: If your Honor please, I am going to object on the part of the defendant; the issue of negligence in the state court is not at issue here, and I am going to object to this line of questioning relative to that issue of negligence.

Mr. Morris: I am not trying to prove the issue of negligence. I am trying to prove notice or lack of notice of any accident on the occasion complained of.

The Court: That is preliminary; you may proceed.

(Testimony of Leong Cheung.)

Mr. Morris: Q. Where did you see Mazilla Tighe that day?

A. I saw her on the sidewalk.

Q. Where, on the sidewalk?

A. I don't get the question.

Q. Was she walking, standing up, or lying down, or what? A. She was lying down.

Q. She was lying down? A. Yes, sir.

[78]

Q. Where were you?

A. I was coming out of the restaurant.

Q. The Piccadilly Restaurant?

A. Yes, sir.

Q. When you came through the door, did you see Mazilla Tighe; did you see the lady?

A. Yes, sir.

Q. And she was lying down, you say?

A. Yes, sir.

Q. What did you do? A. I picked her up.

Q. You picked her up? A. Yes.

Q. What did you do then?

A. I picked her up and took her in and set her on the chair; she seemed to be hurt, so I got to do some work—there is something else for me to do, so I called ambulance; and ambulance came and took her away.

Q. What were you doing; did you have a truck there that day, anywhere near the scene of this accident. A. We had the truck across the curb.

Q. Truck across the curb? A. Yes.

(Testimony of Leong Cheung.)

Mr. Treadwell: Q. What do you mean by, "across the curb"?

A. There is the curb here, and a curb across the street.

The Court: Q. Was it on the sidewalk?

A. It was on the sidewalk. The Piccadilly Inn is on this side, and the truck was across the curb.

Q. Did you drive over the curb?

A. No; my boss driver over the curb.

Q. Did you drive over the curb?

A. No; on the next side of the street, there is a curb here, and the truck was over on this side.

Q. On the other side? A. Yes, sir.

Mr. Morris: Q. You were parked across the street from Piccadilly Inn? A. Yes, sir.

Q. What were you doing on the truck?

A. I do all the carrying.

Q. You were doing the carrying? A. Yes.

[79]

Q. You had carried something inside, had you?

A. I carried something in; but I was walking out.

Q. Where were you going when you were walking out and you saw the lady on the sidewalk; where were you going?

A. I was going to the truck to get some more stuff.

Q. To get some more stuff?

A. Yes, sir.

(Testimony of Leong Cheung.)

Q. Were you going to bring that into the Piccadilly Inn? A. Yes, sir.

Q. Then you saw this lady on the sidewalk and you picked her up and took her in?

A. Yes, sir.

Q. Did she tell you how she fell down?

A. No.

Q. Did you run into her? A. No.

Q. Did you ever touch her? A. No.

Mr. Ryan: I renew my objection, if they are going to prove an issue of negligence, which is not in issue here.

Mr. Morris: I am not trying to prove negligence.

Q. When was the first time that you ever heard that Mrs. Tighe was making a claim against you?

The Court: I do not see how that is material here. I think Mr. Ryan's objection is good.

Mr. Treadwell: I think, your Honor, that what counsel is trying to do is to get rid of our defense that we did not receive notice, by showing that he did not know of any accident; so I suppose he would be entitled to show that, but not go any further into it than that.

Mr. Morris: We do not have to report accidents that we do not know of. I am trying to prove that this man did not know that he had an accident.

Mr. Ryan: That can be done by direct question and answer.

(Testimony of Leong Cheung.)

Mr. Morris: Maybe I have gone a little to far afield; but that is my purpose. [80]

Q. Did this woman ever tell you you hurt her?

A. No.

Q. The first you knew about any claim was when the suit was filed? A. Yes, sir.

Q. Did you tell Ah Chong that you had the accident?

A. I did not tell him about any accident; but when he was driving away I told him I picked a lady up.

Cross Examination

Mr. Treadwell: Q. The date of this alleged accident, Ah Chong was driving the truck, on that occasion, was he not?

A. He always did the driving.

Q. On this day, he was driving the truck?

A. Yes, sir.

Q. He drove the truck in a position where he could see you make the deliveries?

A. I don't understand.

Q. Was the position of his truck so that he could see the Piccadilly Inn?

A. Well, it was across the street.

Q. He could see the Piccadilly Inn, could he not? A. Sure.

Q. And, as you came in and out there every time that you got vegetables from the wagon to bring into the Piccadilly Inn, he could see you make deliveries in there, could he not?

(Testimony of Leong Cheung.)

A. Sometimes.

Q. He saw you pick up the woman on the sidewalk, did he not? A. No.

Q. You mentioned it to him after you had done that? A. Yes.

Redirect Examination

Mr. Morris: Q. Did you ever go to the Maryland Casualty Company's office after this suit was filed? A. Yes.

Q. When was that?

A. I can't remember the day; I only remember I took Ah Chong with me.

Q. Were you two by yourselves?

A. Yes, sir.

Q. Did anybody tell you that they were not going to handle this case?

A. Well, I don't remember him saying anything about that.

The Court: Q. What did Mr. Berger say to you? A. Say to me?

Q. Yes. [81]

A. I can't remember the things that he said.

Q. Did he tell you that he could not handle the case? Did he tell you that the insurance did not cover the accident?

A. Maybe he did; but I don't think he did.

Q. What is your best recollection of what he told you?

A. Well, he was going to take care of us.

(Testimony of Leong Cheung.)

Q. What did he say to you? Do you remember what he said to you?

A. I remember he said something about we needed some lawyer to help me along, too.

Q. Is that all you remember?

A. He mentioned something about the insurance, but I don't remember what it was.

Q. Were you there a long time?

A. Pretty long.

Q. Did you talk some time?

A. Yes, sir.

Q. Did he try to explain something to you about the policy? A. No.

Q. Well, you talked a lot?

A. Yes; he asked me how the thing happened and all that.

Q. Did he tell you to go up and see Mr. Wright?

A. I don't remember that.

The Court: Anything further?

Mr. Morris: Q. Ah Chong's business is selling vegetables; a vegetable store and delivery?

A. Yes, sir.

Q. Did anybody ever write you any letter?

A. What kind of a letter?

Q. Did the Maryland Casualty Company ever write you a letter?

A. They wrote me they wanted to have my deposition taken.

Q. They wrote you they wanted to have your deposition taken? A. Yes, sir.

(Testimony of Leong Cheung.)

Q. Is that the only letter they ever wrote you?

A. I think they wrote me two.

Q. Did you read them? A. Yes, sir.

Q. Show him that letter. That letter is addressed to Ah Chong: was it a letter like that, that you had in your hand? [82]

A. I don't think I seen one like this.

Q. But you think you got two letters?

A. Yes, sir.

Q. One was about the deposition. What was the other one about? A. It was a short one.

Q. What was the short one about? Don't you remember? Have you got the two letters?

A. I can go home and look for it; I know it was not this one.

Recross Examination

Mr. Treadwell: Q. Do you remember when Ah Chong got that letter?

A. No.

The Court: Q. Did Ah Chong show you that letter? A. No.

Q. Did he talk to you about it?

A. He told me that the Insurance Company say they are going to sue, or something like that.

Q. Going to sue you? A. Yes, sir.

Mr. Treadwell: Q. Now, you say that you went down to see Mr. Berger. How many times did you go to see Mr. Berger?

(Testimony of Leong Cheung.)

A. I can't remember exactly; but it was more than two times.

Q. It was more than two times?

A. Yes, sir.

Q. Mr. Berger asked you why you didn't let him know about the accident sooner?

A. I don't think so.

Q. Well, didn't he tell you that this was an automobile insurance only?

A. He told me it was an automobile policy; but he didn't say only.

Q. He said it was automobile insurance

A. Yes, sir.

Q. And he told you that you had better get yourself an attorney, didn't he?

A. He didn't say, "better get our own"; but he said to help me.

Q. Did he tell you the Company would not be liable unless it was connected with the automobile?

A. I did not hear him say anything about that.

Mr. Treadwell: That is all. [83]

Redirect Examination

Mr. Ryan: Q. Just one more question: At the time that you went to the office of the Insurance Company, you only went to one office, did you not? You did not go to two offices in the Insurance Company?

A. I think it was only one.

Q. At the time you were there, you saw Mr. Berger and Mr. Donald Seibert, did you not?

(Testimony of Leong Cheung.)

A. I don't know; I only saw him, I think.

Q. You only saw Mr. Berger?

A. Yes, sir.

Q. At that time, he took a report of the accident,—everything that happened there?

A. Yes, sir.

Q. So that all that happened when you went to the office was that he just took a report of the accident?

A. No; he told us something about the policy, too.

Q. The only person you saw then was Mr. Berger? A. Yes, sir.

Q. And that was at the Maryland Casualty building?

A. Yes; I saw one man before, but not that day.

Q. You saw Mr. Seibert?

A. Well, I don't know what his name is.

Q. Another lawyer up there?

A. We did not talk with him there.

Q. Did you see any other lawyer at the Maryland Casualty Company besides Mr. Berger?

A. Not with us.

Q. After you picked up the lady on the sidewalk, you went in and called the ambulance?

A. Yes, sir.

Q. And you told Ah Chong, when you got back to the truck, that you had called the ambulance for the woman, did you not? A. Yes.

Mr. Ryan: That is all.

EARL C. BERGER,

recalled.

Cross Examination

(resumed)

Mr. Morris: Q. Mr. Berger, was Mr. Wright ever in your office? [84]

A. I never spoke to him in our office; I spoke to him over the telephone.

Q. He never was in your office, as far as you know?

A. Not while I was there. He might have been in my office while I was not there.

Q. Mr. Berger, were you still connected with the Maryland Casualty Company in June, 1938?

A. No.

Q. Then, you don't know what, if anything, prompted the bringing of this suit in the Federal court in June, 1938—what led up to that?

A. In June, 1938?

Q. Yes.

A. I was not with the Maryland Casualty Company then.

Mr. Ryan: That is all.

Mr. Treadwell: That is all.

Mr. Morris: That is all of the evidence that we have for the defendants Ah Chong and Leong Cheung.

Mr. Ryan: With reference to the evidence on behalf of Mazilla Tighe, we stand upon the alle-

gations set out in the complaint which we believe are good.

The Court: So far as the testimony is concerned, is the case submitted?

Mr. Treadwell: I think there are one or two things that we can agree on. We have already agreed that the deposition was taken on March 8th. The last accident was November 26, 1937.

Mr. Ryan: I believe that is correct.

Mr. Treadwell: The complaint was filed on January 23, 1938.

Mr. Ryan: I believe that is correct.

Mr. Treadwell: The service of the complaint on the defendants was on what date?

Mr. Ryan: I have not got the date. The service was a week [85] later, if you want to stipulate to that?

The Court: A week later than January 23rd?

Mr. Treadwell: I would not want to stipulate to that.

Mr. Ryan: I will furnish the Court with that date.

Mr. Treadwell: I have here the fact that on February 3, 1938, a stipulation was signed extending the time to answer to February 17, 1938.

Mr. Ryan: What was the date of that?

Mr. Treadwell: February 3rd was the date of the stipulation.

Mr. Ryan: It was some time thereafter.

Mr. Treadwell: Yes, that is true. The complaint was filed January 23rd, and we made a stipulation,

dated February 3rd, extending the time to answer to February 17th.

Mr. Ryan: You answered then?

Mr. Treadwell: On February 17th, the answer was filed. On March 8th, the deposition was taken, and on April 30th a memorandum by the plaintiff to set the case for trial was filed.

Mr. Ryan: Yes, that is correct; and was served on Donald Seibert.

Mr. Treadwell: Served and filed on him on the 17th; and the case was set for trial for June 21, 1938.

Mr. Ryan: Yes.

Mr. Treadwell: And on June 20th, this complaint in the Federal court was filed.

Mr. Ryan: Yes.

Mr. Morris: Will it also be stipulated that George M. Naus was also employed by the Maryland Casualty Company to try the case that was set in June?

Mr. Treadwell: That is correct.

Mr. Ryan: Donald Seibert was attorney of record as far as the case is concerned? [86]

Mr. Treadwell: Yes; but I imagine Mr. Naus was to try the case. That is all.

(Thereupon, the case was submitted on briefs to be filed five, five and five.)

[Endorsed]: Filed Feb. 9, 1940. [87]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS, IN AND FOR THE NINTH CIRCUIT

Notice is hereby given that Maryland Casualty Company, a corporation, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals in and for the Ninth Circuit from the portion of the final judgment entered in this action on November 24, 1939, by which it was ordered, adjudged and decreed [88] as follows:

"4. That the cause of action alleged and involved in the complaint, according to the allegations of the complaint in the state court, and as they developed in the trial of this case, occurred after certain vegetables had been removed from the truck and delivered, but it appears by the evidence here that, if the accident was at all caused by the insured, it was caused while the said Leong Cheung was returning to the truck to obtain from said truck further vegetables for delivery to the said Piccadilly Inn, and that such state action and injury would be and is within the coverage of said policy.

"5. That plaintiff take nothing by its said action and that defendants have and recover from the plaintiff their costs of suit taxed at the sum of $....., and that the preliminary injunction issued herein be and the same hereby is dissolved."

Dated: February 2, 1940.

EDWARD F. TREADWELL
REGINALD S. LAUGHLIN
530 Standard Oil Building,
San Francisco, California.
Attorneys for Plaintiff and Appellant

RUSSELL E. BARNES
Of Counsel

[Endorsed]: Filed Feb. 3, 1940. [89]

The premium charge on this bond is $10.00 per annum.

[Title of District Court and Cause.]

COST BOND ON APPEAL

In Equity No. 4279S

Know All Men by These Presents, That we, Maryland Casualty Company, a Corporation, as Principal, and United States Fidelity and Guaranty Company, a Corporation, having its principal place of business in the City of Baltimore, State of Maryland, and having a paid-up capital of Two Million Dollars ($2,000,000.00) duly incorporated under the laws of the State of Maryland, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California and United States of America

respecting such corporations, are held and firmly bound unto the Defendants in the sum of Two Hundred Fifty and no/100 ($250.00) Dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals and dated this 22nd day of January, 1940.

Whereas, the above named Plaintiff has prosecuted an appeal to the United States Circuit Court of Appeals, Ninth Circuit to reverse the judgment of the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Southern Division in the above entitled cause.

Now Therefore, the condition of this obligation is such that if the above named Plaintiff shall prosecute its said appeal to effect and answer all costs if the appeal is dismissed or the judgment is affirmed, or such costs as the [90] Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

The undersigned Surety agrees that in case of any breach of any condition hereof the Court may, upon not less than ten days' notice to the undersigned, proceed summarily to ascertain the amount

which the undersigned, as surety, is bound to pay on account of such breach, and render judgment against it and award execution therefor, not to exceed the sum specified in this undertaking.

MARYLAND CASUALTY
COMPANY
By E. C. PORTER
Resident Vice-President
UNITED STATES FIDELITY
AND GUARANTY COMPANY
By ERNEST W. COPELAND
Attorney in Fact [91]

State of California,
City and County of San Francisco—ss.

On this 22nd day of January in the year one thousand nine hundred and forty before me, W. W. Healey a Notary Public in and for the City and County of San Francisco, personally appeared Ernest W. Copeland known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as Surety and his own name as Attorney-in-fact.

[Notarial Seal] W. W. HEALEY
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires August 29, 1941.

[Endorsed] Filed Feb. 3, 1940. [92]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

The plaintiff above named hereby designates the following points as the points on which it intends to rely on the appeal herein.

1. The Court erred in finding that the alleged accident and resulting injuries, if any, occurred as the defendants [93] were using the truck in making delivery of produce to a customer, in this (1) that the evidence and findings show that the truck was not used to make such delivery, but delivery was made by an employee of the insured, and (2) that the delivery was complete and the employee at the time of the accident was returning to the truck which at the time was parked on the opposite side of the street.

2. The Court erred in finding that the accident caused by an employee after he had unloaded produce from the truck and carried it by hand across the street and sidewalk and delivered the same to a customer in a building on the opposite side of the street and was returning to the truck for further produce at the time of the accident, is within the coverage of the policy involved herein.

3. The Court erred in finding that because the employee was returning to the truck with the purpose of obtaining produce in order to make further deliveries, the accident resulted from the use of the truck, or from the loading or unloading thereof.

4. The Court erred in holding that the accident involved in the action in the state Court was within the coverage of the insurance policy involved herein.

5. The Court erred in not holding that the accident involved in the action in the state Court was not within the coverage of the insurance policy involved herein.

6. The Court erred in adjudging that plaintiff take nothing by this action, in that it should have adjudged that said accident was not within the coverage of the insurance policy involved herein.

7. The Court erred in not adjudging that plaintiff has no obligation under said policy to defend said action in the [94] state Court.

8. The Court erred in not adjudging that plaintiff has no liability under said policy by reason of the accident involved in the action in the state Court because the said accident did not arise out of the use of the automobile described in and covered by said policy.

9. The Court erred in not enjoining the defendants from taking any proceedings for the purpose of imposing any liability upon plaintiff based upon any judgment that may be rendered for Mazilla Tighe in said action in the state Court.

10. The Court erred in dissolving the preliminary injunction.

11. The Court erred in awarding costs to defendants and in not awarding costs to plaintiff.

Dated: February 8, 1940.

EDWARD F. TREADWELL
REGINALD S. LAUGHLIN
530 Standard Oil Building,
San Francisco, California.
Attorneys for Plaintiff and
Appellant

RUSSELL E. BARNES
Of Counsel

[Endorsed]: Filed Feb. 9, 1940. [95]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California,
City and County of San Francisco—ss.

Eve Miller, being first duly sworn, deposes and says:

That at all times herein mentioned her business address was and still is 530 Standard Oil Building, San Francisco, California; that at all times herein mentioned she was and still is a citizen of the United States and a resident of the City and County of San Francisco, State of California, over the age of eighteen (18) years and not a party to the above entitled proceeding;

That on the 8th day of February, 1940, she deposited [96] in the United States mail at said City and County of San Francisco, State of California,

a true copy of the within Statement of Points to be Relied Upon on Appeal and the within Appellant's Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal, enclosed in a sealed envelope with postage fully prepaid, addressed to

Charles B. Morris, Esq.,
Mills Building,
San Francisco, California.

Messrs. Young & Ryan,
1924 Broadway,
Oakland, California.

That there is delivery service and regular communication by mail between the said place of mailing and the place addressed.

EVE MILLER

Subscribed and sworn to before me this 9th day of February, 1940.

[Seal] LULU P. LOVELAND

Notary Public in and for the City and County of San Francisco, State of California

[Endorsed]: Filed Feb. 9, 1940. [97]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF THE PORTIONS OF THE RECORD, PROCEEDINGS, AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEL

The plaintiff above named, having heretofore filed its notice of appeal in this matter, hereby designates for inclusion in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit the following portions of the record, proceedings and evidence herein:

1. Complaint for Declaratory Relief, Etc.
2. Temporary Injunction.
3. Answer of Defendants Ah Chong and Leong Cheung.
4. Answer by Defendant Mazilla Tighe to Complaint for Declaratory Relief. [98]
5. Pre-Trial Order.
6. Opinion dated September 11, 1939.
7. Judgment signed and entered on November 24, 1939.
8. Findings of Fact and Conclusions of Law.
9. Order Amending Findings.
10. The Notice of Appeal, with date of filing.
11. Statement of Points to be Relied Upon on Appeal.
12. Appellant's Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

13. All evidence stenographically reported at the trial.

Dated: February 8, 1940.

EDWARD F. TREADWELL
REGINALD S. LAUGHLIN
530 Standard Oil Building,
San Francisco, California.
Attorneys for Plaintiff and Appellant

RUSSELL E. BARNES
Of Counsel

[Endorsed]: Filed Feb. 9, 1940. [99]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 99 pages, numbered from 1 to 99, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Maryland Casualty Company vs. Mazilla Tighe, Ah Chong and Leong Cheung, No. 4279-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of $21.05 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of March A. D. 1940.

[Seal] WALTER B. MALING
Clerk.

B. E. O'HARA
Deputy Clerk.

[Endorsed]: No. 9473. United States Circuit Court of Appeals for the Ninth Circuit. Maryland Casualty Company, a corporation, Appellant, vs. Mazilla Tighe, Ah Chong and Leong Cheung, Appelees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 14, 1940.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals in and for the Ninth Circuit

No. 9473

MARYLAND CASUALTY COMPANY,

Appellant,

vs.

MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,

Appellees.

APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Comes now the appellant above named and hereby designates the points on which it intends to rely on this appeal to be the points stated in the Statement of Points to be Relied upon on Appeal, which was filed with the District Court of the United States in and for the Northern District of California, Southern Division, on February 9, 1940, and which are set forth on pages 93, 94 and 95 of the certified transcript of record on appeal in the above entitled matter.

EDWARD F. TREADWELL
REGINALD S. LAUGHLIN
Attorneys for Appellant

RUSSELL E. BARNES
Of Counsel

[Endorsed]: Filed Mar. 14, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION ON APPEAL.

Comes now the appellant above named and hereby designates for consideration of the points on which it intends to rely on this appeal the entire certified transcript of record on appeal in the above entitled matter, and hereby designates for the printed record on appeal said entire certified transcript of record.

EDWARD F. TREADWELL
REGINALD S. LAUGHLIN
Attorneys for Appellant

RUSSELL E. BARNES
Of Counsel

[Endorsed]: Filed March 14, 1940. Paul P. O'Brien, Clerk.

No. 9473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY
(a corporation),
Appellant,

vs.

MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,
Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes and Codes

Texts

No. 9473

IN THE

United States Circuit Court of Appeals

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MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

A. STATEMENT AS TO JURISDICTION.

This action for declaratory relief was commenced by the appellant in the District Court of the United States for the Northern District of California, Southern Division.

Section 274d of the Federal Judicial Code, provides, in part, as follows:

> "(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate

pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith."

In paragraph IV of the complaint (R. p. 3) the following allegation is made:

"That this suit is brought under and pursuant to the Federal Declaratory Judgment Act. (Judicial Code, section 274d, 28 U. S. C. A. section 400.)"

In paragraph VIII of the complaint (R. p. 6) we find the following allegations:

"That an actual controversy exists as between plaintiff and defendants herein, as follows: Defendants Ah Chong and Leong Cheung contend that since the automobile referred to in said complaint in said action brought by said Mazilla Tighe is the same automobile described in said insurance policy plaintiff herein has the obligation under said policy to defend said Ah Chong and Leong Cheung in said action; further, defendants Ah Chong, Leong Cheung and Mazilla Tighe con-

tend that if it should be adjudged in said action that said Ah Chong and Leong Cheung have any liability to pay any sums to said Mazilla Tighe by reason of the alleged accident set forth in said complaint in said action, then plaintiff herein has the obligation under said policy to pay said sums to said Mazilla Tighe up to the aggregate amount of $5,000; on the other hand, plaintiff herein denies and controverts said contentions and each of them and on its part contends that although the automobile referred to in said complaint of said Mazilla Tighe is the same automobile described in said policy of insurance, plaintiff herein has no obligations or liability under said policy so far as said alleged accident is concerned because said alleged accident did not arise out of the use of said automobile or the loading or unloading thereof; further plaintiff herein contends that it was released of all obligations and liability under said policy so far as said accident is concerned by reason of the failure of defendant Ah Chong to notify plaintiff that any such accident occurred for more than sixty days after it is alleged in said complaint the same occurred."

Section 24(1) of the Federal Judicial Code provides, in part, as follows:

"The District Courts shall have original jurisdiction as follows:

First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, * * * the sum or value of $3,000 and * * * (b) is between citizens of different states, or (c) is between citizens of a state and foreign states, citizens, or subjects."

In paragraph I of the complaint (R. p. 2) we find the following allegations:

> "That plaintiff, Maryland Casualty Company, is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized and licensed to do business in the State of California, and having its principal place of business within the State of California, in the City and County of San Francisco."

In paragraph II of the complaint (R. p. 3) we find the following allegations:

> "That defendant Mazilla Tighe is a citizen of the State of California, and resides in the County of Alameda in said state; that defendant Ah Chong is a citizen and subject *to* the Republic of China, and resides in the City and County of San Francisco, in the State of California; that defendant Leong Cheung is a citizen of the State of California, and resides in the City and County of San Francisco in said state."

In paragraph III of the complaint (R. p. 3) we find the following allegation:

> "That the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.)."

This Court has jurisdiction to entertain this appeal by virtue of the provisions of Section 128 of the Federal Judicial Code. Said Section 128 provides, in part, as follows:

"The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions.

First—In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title. * * *"

B. STATEMENT OF THE CASE.

This is a suit for declaratory relief and an injunction. Upon the filing of the complaint a preliminary injunction was issued and an appeal from the order to this Court was dismissed without passing on the merits. (*Maryland Casualty Co. v. Tighe* (1938, C.C.A. 9th) 99 F. (2d) 727.) On the trial judgment went for defendants and plaintiff appeals.

The sole question involved is whether an accident which is the subject of an action in the State Court, is within the coverage of an automobile policy issued by the plaintiff to the defendant Ah Chong. The policy was attached to the complaint and it insures against injuries arising out of the ownership, maintenance and use of an automobile (truck), and provided that the use included "the loading and unloading thereof".

The complaint in the State Court (R. pp. 29-36) thus alleged the facts surrounding the accident:

"III.

That on the 26th day of November, 1937, the defendant Leong Cheung was an employee, agent

and servant of his co-defendant Ad Chong, and was by him regularly employed to distribute and deliver vegetable produce, and in the performance of said employment said defendant Leong Cheung was required to, and he did, operate and drive a certain delivery truck for the purpose of making deliveries of produce to various retail trade in said City and County of San Francisco; that said deliveries were made by said Leong Cheung by carrying vegetable produce from the said truck to various patrons of his employer, Ad Chong.

IV.

That at all times herein mentioned Sutter Street was and now is a public street in the City and County of San Francisco, California; that said street runs in a general easterly and westerly direction; that on said street, and in the block numbered '300', a restaurant is located known as the 'Piccadilli Inn'; that plaintiff herein is informed and believes, and upon such information and belief alleges the fact to be, that at times herein mentioned the aforesaid Piccadilli Inn was a customer of said Ad Chong and customarily and at intervals receives produce vegetables from said Ad Chong, and by and through the delivery thereof by Leong Cheung.

V.

That on or about the 26th day of November, 1937, and in the morning thereof at approximately 8:34 A. M., defendant Leong Cheung was making a delivery of produce vegetables to the said Piccadilli Inn, and that at said time and place he had left his aforesaid delivery truck standing parked at the curb and opposite to, and

about ten feet from, the entrance of said Piccadilli Inn.

That at said time and place the plaintiff herein was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilli Inn; that at said time and place defendant Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: That *after making a delivery to the aforesaid Piccadilli Inn,* he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder as he continued running forward, in a negligent and careless manner; that he ran toward the aforementioned truck at the curb, and in so doing collided with the plaintiff herein as she walked along the aforesaid sidewalk, with such force and effect that plaintiff was knocked violently to the sidewalk and was caused to sustain injuries as more particularly hereinafter appears." (Italics ours.)

On the trial of the suit at bar this statement was by evidence somewhat amplified, and to a certain extent modified, and the facts thus shown which surrounded the accident are stated in the findings (R. pp. 61-71) in this case as follows:

"6. That on or about the 25th day of January 1938, defendant Mazilla Tighe commenced an action for damages against defendants Ah Chong and Leong Cheung in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled Mazilla Tighe,

Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants, and numbered therein No. 278962; that in the complaint of said Mazilla Tighe, in said action said Mazilla Tighe alleged that on the 26th day of November, 1937, said Leong Cheung was an employee of said Ah Chong and, while so employed, said Leong Cheung made a delivery of vegetable produce to a restaurant known as Piccadilly Inn and located in the 300 block of Sutter Street in San Francisco, from a delivery truck parked at the curb on said Sutter Street and opposite to, and about ten feet from, the entrance of said Piccadilly Inn; that at said time and place said Mazilla Tighe was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilly Inn; that at said time and place said Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: that after making a delivery to the aforesaid Piccadilly Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder, as he continued running forward, in a negligent and careless manner; that he ran toward the aforesaid truck at the curb, and in so doing collided with said Mazilla Tighe as she walked along the aforesaid sidewalk, with such force and effect that said Mazilla Tighe was knocked violently to the sidewalk and was caused to sustain injuries as more particularly in said complaint appears; * * *.'' (R. pp. 62-64.)

"7. That the facts as they are set out in the complaint heretofore referred to and designated as Exhibit 'B' and as developed on the trial of this case indicates that the alleged accident and resulting injury, if any, occurred as the defendants were using this truck in making delivery of produce to a customer and while defendant Leong Cheung was returning to the truck to obtain further vegetables for delivery, and is within the coverage of the aforesaid policy hereinbefore designated as Exhibit 'A'." (R. p. 64.)

"12. With regard to the accident involved in said action in the state court, the court finds that on the 26th day of November, 1937, the truck in question was parked against the curb on the opposite side of Sutter Street from Piccadilly Inn, and the said defendant Leong Cheung removed certain vegetables from said truck and carried them across Sutter Street and across the sidewalk thereof into said Piccadilly Inn, and there delivered and left the said vegetables. He then started to return to said truck for the purpose of obtaining further vegetables to deliver to the said Piccadilly Inn, and if the said plaintiff Leong Cheung collided at all with plaintiff Mazilla Tighe (which said plaintiff Leong Cheung denies) the collision happened as he emerged from said Piccadilly Inn for the purpose of obtaining further vegetables and before the unloading of vegetables for Piccadilly Inn from said truck had been completed." (R. p. 67.)

From these facts the trial Court concluded that the accident was within the coverage of the policy, and therefore dissolved the temporary injunction and gave judgment for defendants with costs. (R. pp. 68-69.)

As the findings set forth the probative facts fully and correctly, it is unnecessary to review the evidence in order to combat the legal conclusion that the accident is within the coverage of the policy.

C. SPECIFICATION OF ERRORS.

1. The Court erred in finding that the alleged accident and resulting injuries, if any, occurred as the defendants were using the truck in making delivery of produce to a customer, in this (1) that the evidence and findings show that the truck was not used to make such delivery, but delivery was made by an employee of the insured, and (2) that the delivery was complete and the employee at the time of the accident was returning to the truck which at the time was parked on the opposite side of the street.

2. The Court erred in finding that the accident caused by an employee after he had unloaded produce from the truck and carried it by hand across the street and sidewalk and delivered the same to a customer in a building on the opposite side of the street and was returning to the truck for further produce at the time of the accident, is within the coverage of the policy involved herein.

3. The Court erred in finding that because the employee was returning to the truck with the purpose of obtaining produce in order to make further deliveries, the accident resulted from the use of the truck, or from the loading or unloading thereof.

4. The Court erred in holding that the accident involved in the action in the State Court was within the coverage of the insurance policy involved herein.

5. The Court erred in not holding that the accident involved in the action in the State Court was not within the coverage of the insurance policy involved herein.

6. The Court erred in adjudging that plaintiff take nothing by this action, in that it should have adjudged that said accident was not within the coverage of the insurance policy involved herein.

7. The Court erred in not adjudging that plaintiff has no obligation under said policy to defend said action in the State Court.

8. The Court erred in not adjudging that plaintiff has no liability under said policy by reason of the accident involved in the action in the State Court because the said accident did not arise out of the use of the automobile described in and covered by said policy.

9. The Court erred in not enjoining the defendants from taking any proceedings for the purpose of imposing any liability upon plaintiff based upon any judgment that may be rendered for Mazilla Tighe in said action in the State Court.

10. The Court erred in dissolving the preliminary injunction.

11. The Court erred in awarding costs to defendants and in not awarding costs to plaintiff.

D. ARGUMENT.

The trial judge in deciding the case filed a written opinion. (R. p. 56.) He held that if the man who made the delivery and was returning at the time of the accident had completed the delivery of all produce from the truck destined to that particular customer, the accident would not be covered, but since the man making the delivery intended to return to the truck for further produce for the same customer, the unloading was not complete. From this he concluded that the accident arose out of the use of the truck. He neither cited nor relied upon any authority construing such a policy. The only cases cited by him were cases to the effect that if the policy was ambiguous it should be construed against the insurance company.

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(1) THE POLICY WAS NOT AMBIGUOUS AND SUCH POLICIES HAVE BEEN MANY TIMES CONSTRUED NOT TO COVER ACCIDENTS WHICH OCCUR (1) IN THE PROCESS OF DELIVERY, WHERE THE DELIVERY IS DISCONNECTED WITH THE USE OF THE TRUCK, OR (2) IN CONNECTION WITH THE ARTICLE UNLOADED BUT AFTER THE UNLOADING OF THE ARTICLE IS COMPLETE. NO CASE MAKES THE DISTINCTION DRAWN BY THE TRIAL JUDGE IN THIS CASE.

The cases which have arisen under such policies are of two classes: (1) where an article is unloaded, and the driver of the truck then makes delivery by hand or other means, leaving the truck, passing from the street into a building, and the accident occurs during such delivery; (2) where merchandise is unloaded, but

is left in a dangerous place and causes an injury. In both classes of cases it is held that the accident does not arise out of the use and operation of the truck or out of the unloading thereof. These decisions are so numerous and so uniform that they should be held to enter into the policy. At all events we submit that they correctly construe the policy and correctly hold that the policy is in no way ambiguous. We therefore submit the matter on a review of those cases, which we now make:

> *Jackson Floor Covering Company v. Maryland Casualty Company,* 189 Atl. 84, 117 N. J. Law 401 (1937).

In this case the Maryland carried the liability policy and another company carried the automobile policy.

The Floor Company had sold several rolls of linoleum to a customer and delivered the same in its truck by backing the truck up to the loading platform and there unloading the linoleum upon a small hand truck for complete delivery of the linoleum to the designated place in the building.

While the hand truck was being propelled a roll of linoleum fell off and injured a third party. Maryland Casualty Company contended that this injury resulted from the loading and unloading of the motor vehicle and was, therefore, covered under the automobile policy and not under the liability policy. The Court said:

> "It appears that the unloading of the plaintiff's automobile truck had been completed and that the

transportation from then on was by a different means; hence, there could have been no concurrent coverage since the carrier insuring the automobile truck was under no obligation."

Franklin Co-Op. Creamery Ass'n. v. Employers' Liability Assurance Corporation, et al. (Minn. 1937), 273 N. W. 809.

In this case the policy provided for coverage of personal injuries, "(1) caused by, and/or owing to the ownership, the maintenance, the use, and/or operation of, all horses, draft animals, and/or vehicles, used in connection with the business operations of the assured described in the declarations, and (2) caused by or resulting from the loading and/or *unloading of the said vehicles*".

The employee of the assured stopped his milk wagon in front of a building, filled his containers with milk bottles, and entered the building. After entering the building he walked about 30 feet to a freight elevator, set down his container, and then, for the purpose of using the elevator pulled on the ropes or cables which controlled its operation. In so doing, he injured a third person. Liability of the assured to the third person was established, and a declaratory judgment is sought to determine whether the insurer had a duty to indemnify the assured.

The Court held that the accident was not within the policy, saying at page 810:

"1. Was the process of unloading complete? We are of the opinion that the trial court rightly held that it was. The process of distributing

bottled milk at retail is familiar to us all and we take judicial notice of it. Rundquist had started on his rounds to peddle milk to his various customers. After he left his wagon carrying his containers, the process of retail distribution commenced. If he had served customers on the first floor prior to his attempt to take the elevator, it could hardly be contended that he was still engaged in unloading the vehicle. Nor could it be so contended if some accident had happened while he was passing from customer to customer. We see no difference in principle or in the application of the policy between such situations and the one at bar. Many cases are cited by appellant but are distinguishable on the facts. Necessarily the unloading of a great variety of merchandise involves various situations resulting in various holdings as to when the process of unloading terminates. Within limits each case must stand on its own facts. This one stands outside the terms of the unloading clause of the policy."

Zurich General Accident & Liability Ins. Co., Limited v. American Mut. Liability Ins. Co. of Boston, 192 Atl. 387, 118 N. J. Law 317 (1937).

The point in controversy was which of two policies of liability insurance, issued by plaintiff and defendant, respectively, affords indemnity coverage.

It was stipulated that a chauffeur of the assured

" 'had driven an automobile belonging to said concern to the store of Borer, who was a customer of said corporation and had removed from said automobile truck a can of milk and a cake

> of ice, which milk and ice the chauffeur had carried from said automobile to the store of the said Borer and while placing the milk and ice in an icebox maintained in the interior of the premises of said Borer, injured the said Borer' ".

The company whose policy covered accidents caused by the assured's drivers and chauffeurs, "except those arising in connection with the maintenance, use or operation of teams or motor vehicles", claimed that the injury was covered by the defendant's policy. The defendant had obligated itself

> " 'to pay * * * each loss by reason of liability imposed' upon the assured 'by law for damages, * * * caused by an accident * * * by reason of the use, ownership, maintenance, or operation of the motor vehicle or trailer, or, if the motor vehicle is of the commercial type, by reason of the loading or unloading of merchandise, provided the insured has, as respects such loading or unloading operations, no other collectible insurance' ".

The Court found that the plaintiff rather than the defendant should pay the loss (that is, that unloading had been completed), saying at page 389:

> "We have no occasion to determine whether an accident occurring in the course of the 'loading or unloading' of a vehicle within the policy coverage arises in connection with its 'maintenance, use or operation', within the intendment of plaintiff's policy. Here the unloading of the merchandise had been completed when the accident occurred."

John Alt Furniture Co. v. Maryland Casualty Co., 88 F. (2d) 36 (Circuit Court of Appeals, Eighth Circuit) (1937).

In this case it appeared that the assured's employees in the course of their duties were engaged in delivering furniture to a customer. The furniture was transported to the customer's premises in one of the assured's trucks driven by its employees. In order to carry the furniture from the truck to the customer's apartment, it was necessary to remove a door from the rear of the building. This door was removed and leaned against a clothes pole on the property. The door fell, causing an injury to another occupant of the premises. The insurance company which had written the automobile policy asserted that the accident in question was not covered by its policy, but it did defend the suit under a non-waiver agreement. Judgment went against the assured, who paid the judgment and brought an action for reimbursement against the company which had written the public liability policy. The Court said that the accident in question was not covered by the automobile policy and held that the accident was covered by the public liability policy, although it appeared that the assured's employees were actively engaged in delivering the furniture when the accident occurred. The policy under consideration in this case did not include a loading and unloading clause, but, as we shall see, it has been held that it was not necessary to expressly include "loading and unloading" in order to bring such activity within the coverage of a policy insuring

against loss resulting from the "use, operation or maintenance" of the automobile. The Court in this case clearly felt, as we do, that an accident occurring in connection with the delivery of goods transported by automobile would not fall within the coverage of an automobile policy, even though delivery had not been completed at the time the accident occurred.

The case of *Armour & Company v. General Accident, Fire & Life Assurance Corporation, Ltd.* (Number 20,287-L) decided by Judge Louderback on November 2, 1939, is a recent case in this District on the question of the scope of policies of the type here involved. In this case an employee of Armour & Company unloaded hams from an automobile and by use of a small hand-truck transported them into a market. It was customary for the proprietor of the market to weigh the hams before accepting delivery. On this occasion, however, the proprietor was absent at the moment, and the delivery man left the hams, intending to return later to check the weight and pick up the invoice he had left. The delivery man was negligent in leaving the hand-truck containing the hams in a dangerous place, and by reason of that negligence a customer of the market was injured. In an action based on that negligence the customer recovered judgment against Armour & Company. Armour & Company brought an action against the insurance company which had issued the automobile policy. Judge Louderback granted a motion for a nonsuit, holding in effect that negligence in connection with delivery was not covered by the policy.

Luchte v. State Automobile Mutual Ins. Co.,
197 N. E. 421, 50 Ohio App. 5 (1935).

Plaintiff (the insured) sued to recover expenses in defending a suit which he claimed the defendant insurance company was obligated by its policy to defend. The policy contained the following provisions:

> " 'The Association does hereby insure the assured against liability for loss and all expenses resulting from claims upon the assured for damage caused while this policy is in force, by the use, ownership, maintenance, or operation of the motor vehicle described in Statement 4 of Schedule of Warranties * * *.' "

The facts are stated by the Court, as follows:

> "While the policy was in force, an employee of Luchte delivered a load of coal to a customer, and in making the delivery used the automobile truck insured under the policy. Plaintiff's employee dumped the coal in the street in front of the customer's house, drove away a short distance, turned, and was returning to his place of business from the delivery. He dumped the coal in the early morning before clear daylight, and failed to leave any light or other warning on the pile of coal. A man by the name of Bell, driving a motorcycle, ran into the pile of coal and received injuries from which he died."

The Court decided that under the circumstances the accident did not result from a risk undertaken by the insurance company and that the company was under no duty to defend the action.

The Court apparently took the view that there was no negligence in unloading but that the negligence

was in leaving the pile of coal unprotected. The following is Syllabus 1 prepared by the Court:

> "An automobile liability insurance policy insuring against liability for loss resulting from claims for damages caused by the use, ownership, maintenance, or operation of a coal truck, does not cover a claim for wrongful death resulting from a collision, in the early morning before daylight, with a pile of coal dumped into the street from such truck and negligently left unprotected and without lights or warning, contrary to a city ordinance."

Morgan v. N. Y. Cas. Co. (Ga. 1936), 188 S. E. 581.

The plaintiff sought to recover from the insurance company for its failure to defend him in an action brought against him for personal injuries. The policy provided that the insurance company would pay all claims which the insured might become liable to pay as damages, either direct or consequential, resulting by reason of the ownership, maintenance, or use of a truck for the transportation of materials, *including loading and unloading,* and "to defend suits for damages, even if groundless, in the name and on behalf of the assured".

The Court pointed out that the complaint upon which the suit for personal injury was based did not connect the injury with the use of the trucks. (The complaint stated that the defendant was delivering coal through a chute, and that while chute was unattended plaintiff fell into it.)

The Court concluded that:

> "So it clearly appears from the allegations of the Freeman petition that the proximate cause of his injuries was not from the use or operation of the truck in transporting materials or merchandise or loading or unloading, but that the proximate cause of his injuries was his falling into the open and unattended coal chute, as therein alleged. The insurance company would not be bound to defend a suit, although groundless, unless in some way the injuries resulted from the maintenance or use of the automobile truck."

Stammer v. Kitzmiller, et al. (Wis. 1937), 276 N. W. 629.

The facts as stated by the Court were as follows:

> "On January 16, 1935, an employee of the Blatz Brewing Company was using one of its trucks to deliver beer to a tavern. He parked the truck alongside the curb, got out, and opened a hatchway in the sidewalk; then he removed a barrel of beer from the truck and placed it either on the sidewalk or on the street pavement. He then lifted the barrel and put it through the hatchway into the basement of the tavern. While he was engaged in having the sales slip for the beer signed inside the tavern, the plaintiff fell into the open hatchway, left unguarded by the Blatz employee."

The Court held that the facts stated did not present a case within the terms of the policy. On page 631 the Court said:

> "We pass to the question of the coverage afforded by the stipulation in the Employers Mu-

tual Insurance policy, which reads: 'Operation, maintenance or use (including transportation of goods, loading and unloading) of an automobile'. The stipulation to pay all losses and expenses imposed by law under the clause quoted does not carry the liability of the insurer beyond what may be described as the natural territorial limits of an automobile and the process of loading and unloading it. When the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile then may be said to be no longer in use. The precise line at which the unloading of the automobile ends and a further phase of commerce such as the completion of delivery begins after unloading may in some cases be difficult of ascertainment, but where, as here, the merchandise had been removed from the truck and considerable time had elapsed after anything was done which could reasonably be said to be connected with the actual unloading, there is no difficulty in limiting the responsibility of the insurer who covers loading and unloading operations, and fixing the liability of an insurer who protects against loss arising from the acts caused by employees of the assured engaged in the discharge of their duties to carry on its work off the assured's premises."

The case of *In re Consolidated Indemnity Insurance Co.,* 161 Misc. 701 (New York) (1936); 292

N. Y. S. 743, is of interest although it did not involve delivery. In that case the automobile policy covered liability for damages resulting from the "operation, maintenance, use or the defective construction" of a taxicab belonging to the assured. It was claimed that the assured was liable for damage to a hall resulting from the negligent handling of a trunk which the employee was carrying from the apartment to the taxicab. The Court said that the liability of the assured for the negligent transportation of the trunk was clearly not within the coverage of the policy for the damage to the apartment house was wholly unconnected with the "operation, maintenance, use or construction" of the taxicab. If the Court in this case followed the reasoning of the Court below in deciding the principal case, the assured would have been held liable for the negligent handling of the trunk. The argument would have been "operation, maintenance and use" includes the "loading or unloading" of a vehicle; the carrying of goods toward the vehicle is a part of the process of loading and, accordingly, the accident in question arose out of the "operation, maintenance or use" of the truck.

The coverage contemplated by the committee which drafted the policy is stated by Mr. E. W. Sawyer in his book entitled "Automobile Liability Insurance". His statement, which is quoted below, is in accord with the view of the Courts as to the scope of the policy. Mr. Sawyer says:

> "The placing of goods, merchandise, or other materials in commercial automobiles is recognized as a part of the hazard in the use of the auto-

mobile, and the same is true of removal. As a general rule, it may be said that the hazard contemplated as included in loading and unloading of the automobile does not extend beyond the immediate vicinity of the automobile. The conveyance of furniture from the second floor of a house to the sidewalk does not constitute a part of the loading hazard. The placing of the furniture on the automobile does constitute a part of the hazard contemplated. The actual removal of the goods from the automobile is the unloading hazard which is contemplated. The carrying of goods away from the automobile is not a part of the unloading hazard.

"A reasonable practical interpretation adopted by some companies is that the loading hazard includes carrying the goods from the nearest available place of temporary deposit, such as a platform or sidewalk; and that the unloading hazard includes carrying the goods from the automobile to such place of deposit. This interpretation means simply this: If the automobile is being unloaded in a street, it is not expected that the goods will be deposited in the street. Therefore unloading would be interpreted as including placing the goods on the sidewalk. If the goods are not placed on the sidewalk but are carried beyond it, the unloading hazard would end when the goods had been removed from the automobile.

"A further example will serve to illustrate both the scope and the limitations of the insurance of the loading and unloading hazard. A trucking concern is engaged to transport merchandise. It uses both horse drawn vehicles and automobiles. The merchandise must be transferred from rail-

road freight cars over a platform for a distance of fifty yards. Hand trucks are used for this purpose, and the merchandise is not removed from the hand trucks until they are run onto the automobile or horse-drawn vehicle. The loading hazard which is included in the coverage of the automobile liability policy is that which begins when the hand trucks are run onto the automobiles. And, conversely, the unloading hazard would end when hand trucks, run onto the automobile to be loaded, were run off the automobile. The transferring of the merchandise from the freight cars across the platform by hand trucks or the transfer of the merchandise from the automobiles or horse-drawn vehicles across the platform to the freight cars is not a hazard of loading and unloading of the automobiles or horse-drawn vehicles. Such operations should be insured under appropriate public liability policies."

The appellees have attempted to distinguish the principal case from some of those cited above by saying that when the Courts ruled that unloading had been completed or that the accident did not arise out of the unloading, they meant that because no further merchandise was to be removed from the truck at that particular point, the unloading was complete although delivery was not complete. We believe, however, that the correct conclusion to be drawn from those cases is that the Courts believed that the hazard of actual unloading was within the coverage of automobile policies and that hazards of delivery by means independent of the truck were not covered by such policies. The Courts in the type of cases mentioned

said in effect: the unloading is complete, or the accident did not arise out of the act of unloading, because at the time of the accident the assured was not engaged in unloading the vehicle; he was delivering the merchandise which had been unloaded. That is as true in our case as in the cases in which the distinction is asserted.

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(2) THE FACTS IN THE CASE AT BAR CANNOT BE SUCCESSFULLY DISTINGUISHED FROM THE CASES CITED.

In this case the truck was static at the curb on the opposite side of the street from the place of the accident. It was not being "operated" and its only "use" was in holding certain produce in a static position. Certain produce had been "unloaded" and entirely separated from the truck and carried by hand across the street, across the opposite sidewalk, and into the Inn, and was there delivered and came to rest. In returning empty-handed the delivery boy was neither loading or unloading the truck. His *intention* to go back across the sidewalk and across the street and to the truck and there unload further produce, no more constituted "unloading" than a like intention formed when he left his home in the morning *intending* to ride on the truck and unload produce and make delivery thereof.

The unloading of the produce actually unloaded was completed. No injury occurred from that process, nor did any injury occur from the unloading of further produce, because it was not unloaded but at the time of the accident was still in place on the truck. What

difference does it make whether the boy intended to make further deliveries to the same customer or to some other customer? In neither event was his mere *intention* to unload an act of unloading. The mere fact that the truck was not completely unloaded at the time of the accident does not show that the accident was caused by the "unloading". Suppose the boy had first gone into the Inn to find what produce was desired and was coming back to get the desired produce. That might have been the practice or the system, still his trip into and out of the Inn would not constitute or be a part of the unloading. So far as the produce which was actually delivered is concerned, its unloading caused no injury. It was safely unloaded and delivered without incident. So far as other produce was concerned, its unloading caused no injury, because at the time of the accident it was still resting undisturbed in the truck.

Even if this accident had happened while the produce was being *delivered* it would not be covered unless at the time of the accident the produce was being unloaded. *Delivery* might involve the use of other means of transportation, such as roller skates, tramways, elevators, escalators, hand trucks, stairways, etc. Long distances might be involved. How can such things be held to be "unloading", which is defined as being part of the use and operation of the truck? But here the accident did not occur even during *delivery,* but occurred after the only thing unloaded had been delivered.

Before the rule that a policy must be interpreted against the insurer can be invoked, it must be shown

that the policy is ambiguous. Wherein is the policy ambiguous? The words "use", "operation", "loading" and "unloading" are words of clear meaning. No testimony was introduced as to the meaning of such words. Where, therefore, is the ambiguity? Of course, questions of fact may arise as to whether certain things constitute use, operation, unloading or loading, but that is not because the words are ambiguous. The mere lack of definition of words of ordinary and single meaning does not constitute an ambiguity for which the author of the document is to be penalized by adopting the most unfavorable meaning. That rule can only apply when words are used which have different or double meanings. The words "use", "operation", "loading" and "unloading" are common words which everyone understands. That "use" of an automobile includes the loading and unloading was held even when the policy did not specifically so provide.

Panhandle Steel Products Co. v. Fidelity Union Casualty Co., 23 S. W. (2d) 799 (Texas).

One is using an automobile if he is loading it or unloading it, because both acts are *physically* connected with the automobile. But a person delivering material after it has been unloaded is not using the automobile. One returning to the truck after making a delivery is not using the truck. A use must be physical, not merely mental. A person crating or boxing produce intended to be loaded into a truck is not using the truck. A person transporting produce to a truck with the intention of loading it on the truck is not using the truck. The mere fact that the same person manu-

factures, crates, transports, loads, unloads, and delivers produce does not make manufacture, crating, transporting, or delivery part of the process of loading and unloading, nor does it make such acts a use of the truck. The process, no matter how often repeated, of unloading, delivering and returning from delivery does not make delivery and returning from delivery part of the process of unloading.

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(3) EVEN IF DELIVERY WERE PART OF UNLOADING, RETURNING FROM SUCH DELIVERY CANNOT BE SO CONSIDERED.

If the argument should be made that the unloading was not complete until the article unloaded came to rest, and that, therefore, the unloading of the article was not complete until delivered into the Inn, still the unloading and delivery of that article was complete at all events when it was so delivered. In returning the person making the delivery was certainly not unloading.

E. CONCLUSION.

We submit that the judgment of the District Court should be reversed.

Dated, San Francisco,
May 1, 1940.

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No. 9473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY
(a corporation),
Appellant,

vs.

MAZILLA TIGHE, AH CHONG and
LEONG CHEUNG,
Appellees.

BRIEF FOR APPELLEE MAZILLA TIGHE.

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Subject Index

Table of Authorities Cited

Cases

Statutes and Codes

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BRIEF FOR APPELLEE MAZILLA TIGHE.

STATEMENT OF THE CASE.

The Maryland Casualty Company brought this action in the District Federal Court asking for declaratory relief under Federal Declaratory Judgment Act, 28 USCA §400, and for the purpose of having the coverage determined upon a certain policy it issued to one Ah Chong. This appeal is from the decision of that trial court which held the injury in question covered by the provisions of the policy. Although at the time certain other contentions in addition to policy coverage were advanced, apparently they have

now been abandoned, leaving here for consideration the sole issue of policy coverage.

The facts that gave rise to the instant action, and as set out in the findings and opinion of the trial court are as follows:

On the morning of November 26, 1937, about 8:30 A. M. the plaintiff, Mrs. Mazilla Tighe, was on her way to her place of employment in the White House on Sutter Street in San Francisco. She was proceeding in an easterly direction on the south sidewalk of Sutter Street, and was in the block prior to her destination, having reached a point on the sidewalk opposite the entrance of a restaurant named the "Piccadilly Inn". The sidewalk was about twelve feet wide and she was walking along the center about equidistant from the building and curb lines. When she had reached this point opposite the entrance, one Leong Cheung, defendant, an employee of Ah Chong, emerged from the doorway of this restaurant and in running back toward the curb for a further load of vegetables from a truck parked across the street, negligently collided with Mrs. Tighe, knocking her down and causing serious injuries.

It further developed the Leong Cheung was a young man of the Chinese race and at the time was in the employ of Ah Chong, a fruit and vegetable peddler who was using the truck for that purpose at the time of the accident. The Piccadilly Inn was one of his regular customers. Ah Chong drove the automobile and Leong Chung helped him as delivery boy. On the occasion of this accident, Leong Cheung was then engaged in making a series of deliveries under the

direct supervision and direction of Ah Chong, and after the accident he continued the process of unloading and made two or three more trips, carrying vegetables from the truck into the Piccadilly Inn before the unloading was completed.

Mazilla Tighe instituted an action in the Superior Court of the State of California, in and for the City and County of San Francisco, against Ah Chong, who requested the Maryland Casualty Company, appellants, to defend him under the provisions of the policy herein involved. They declined, except under a reservation of right, and have brought this action for declaratory relief, contending:

CONTENTIONS OF APPELLANT.

(1) That the accident did not arise out of the use of the automobile described and covered by said policy in that the unloading was completed when the goods were physically removed from the truck, and the process of delivery is entirely different from unloading.

(2) That if under any circumstances delivery is part of the unloading, the unloading is complete when the delivery is actually made.

(3) So far as some future or additional unloading is concerned, it certainly would not start until some physical acts were performed on or about the truck for the purpose of effecting such unloading, and the mere intent in the mind of the boy in returning from the Piccadilly Inn, crossing the sidewalk and crossing the street to unload some further goods, constituted no act of unloading within the meaning of the policy.

STATEMENT OF ISSUE.

The provisions of the policy here involved are:

"Item 1: * * * The occupation of the named insured is Fruit and Vegetable Peddler

"'* * * The purposes for which the automobile is to be used are Commercial.

"'* * * The term 'pleasure and business' is defined as personal, pleasure, family and business use. (b) The term 'commercial' is defined as the transportation or *delivery of goods, merchandise or other materials, and uses incidental thereto,* in direct connection with the named insured's business occupation as expressed in Item 1. (c) Use of the automobile for the purposes stated *includes* the *loading and unloading thereof.*

"'* * * Coverage A—Bodily Injury Liability. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile." (Italics ours.)

The single issue is:

Does the accident in the instant case fall within the foregoing provisions of the policy?

Although appellant's contention is not altogether clearly defined, our understanding is that the insurer attempts to escape liability by breaking up the process of unloading and delivery into discrete and discon-

tinuous "unloadings" and "deliveries" and apparently posits the following theory:

(1) That the "unloading" of goods is entirely distinct, different and disconnected from a "delivery" of same.

(2) That the policy protects the insured only against accidents arising out of an "unloading" and is inapplicable to a "delivery".

(3) That in the instant case the term "unloading" as used in the policy refers solely to the physical removal of merchandise from the truck, which occurred preliminary to any given trip across the street into the Piccadilly Inn.

(4) That the appellant is not liable because at the time of the sidewalk collision, the first "unloading" had been consummated and the second "unloading" had not been initiated, even though at said time said merchandise was at rest on the truck which was subsequently "unloaded" and "delivered" within the Inn.

The trial court, however, has pointed out in its opinion (Tr. p. 56), that this construction of the policy is entirely too narrow and that "unloading" was a continuing process which *included all removal of goods,* destined for the Inn, from the truck, *and all deliveries* of same into the Inn. In addition to this, we respectfully urge as indicated above, that appellant's construction does violence to the express terms of the policy, which indemnified the insured against losses arising out of the *use* of the truck, and spe-

cifically defines said use to include not only *"unloading"* but also *"delivery"* of merchandise transported by the insured vehicle.

ARGUMENT.

The court's attention is respectfully directed to the italicized words in the foregoing provisions of the policy. Our view is that unless the phrase *"delivery of goods, merchandise or other material"*, is utterly meaningless and nugatory, the policy, *by its express terms,* protects the insured against losses arising out of the unloading and the delivery of merchandise, both of which are specifically defined herein as *uses* of the automobile.

In attempting to resolve the above issue, consideration must be given to the nature of the assured's business, i. e., fruit and vegetable peddler, and to the specialized use of the insured's vehicle in such business, including the manner of unloading thereof, and the manner of delivery of merchandise therefrom. It must be presumed that the appellant was familiar with the foregoing business and that it was clearly within the contemplation of both parties at the time the contract of insurance was entered into. Specifically, it must be presumed that the appellant at the time the policy was issued, knew that the unloading and delivery of merchandise from the insured's truck, necessitated the removal of such goods from the vehicle by hand and their transportation by foot move-

ment into the purchaser's place of business, and that said unloading and delivery as to any particular vendee ordinarily required a series of trips to and from the truck and the vendee's place of business.

These necessary and inescapable presumptions, coupled with the essential facts of the instant case, logically compel us to adopt the view that at the time of the collision and resultant injury to Mrs. Tighe, the process of serial unloading and delivery was going on,—a process which was continuous, entire and non-severable as to those component elements or acts and which could not and did not end until all the goods purchased had been taken from the insured vehicle and delivered within the vendee Inn.

In an apparent attempt to import a subjective element into the case, appellant's brief repeatedly refers to employee Leong Cheung's "state of mind", declaring vigorously and repetitiously that the mere intent in the mind of Leong Cheung to go back across the sidewalk and there to unload further produce, did not constitute "unloading". There is no aura of mysticism enveloping the single issue raised by this appeal. In resolving that issue, we fail to perceive the necessity of indulging in physical abstractions. The criteria for the fixation of appellant's liability are not subjective, but, however, objective—they are certain physical, visible facts existing *at the time of the accident,* to-wit:

(1) That vegetables had already been taken from the truck into the Picadilly Inn.

(2) That Leong Cheong in the performance of his duty as delivery boy, was moving from the Inn toward the truck, for more produce, and

(3) That merchandise destined for the Inn was still on the truck, the removal of which was necessary to complete the unloading.

The order to bring in vegetables had been given by Ah Chong and Leong Cheung was a mere instrument or appliance of his employer, without initiative, volition or power of independent action and was functioning to carry out the order when he collided with Mrs. Tighe.

It is undeniable that the term "delivery" denotes change, transfer or surrender of possession. A removal of goods from a vehicle and the deposit of same upon the sidewalk would not constitute "delivery" in the ordinary and universally recognized sense of that term. In the instant case the vegetables in Ah Chong's truck could not be delivered until they had been deposited in a place of rest upon the purchaser's premises. In the light of all the circumstances of this case, the operation of "unloading" and "delivery" are logically and effectually inseparable; they cannot be disassociated and together form one continuous unitary process. In the vast majority of cases construing automobile liability policies, commodities taken from the insured vehicle are placed on the sidewalk, or platform, or hand-truck, or some other place of temporary deposit, before possession is transferred by the vendor to the vendee. In the case at bar, however, it must be

borne in mind that there was no intermediate place of position or rest, or deposit, between the truck and the kitchen of the Inn, from the time they were lifted from the truck until the time they were placed in a position of rest within the kitchen, and the vegetables were in a course of continuous unbroken transit. It was because of this decisive factor, we believe, that the court below held that the process of unloading included the delivery of the vegetables. Assuming that the policy in question was completely silent on the subject of delivery, we urge that accidents occurring during this single continuous process would fall within that portion of the policy that defines "unloading" as one of the *uses* of the automobile, and, that the process of unloading began with the removal of the first vegetables, and continued without break or pause, and did not end until the last of the purchased goods had been deposited in the Inn's kitchen.

In placing a construction and limitation upon the insurer's legal responsibilities within the policy coverage, the courts sometimes state the problem in terms of legal causation. In endeavoring to define the limitation of the legally protected interest, all cases must be considered in the light of their particular facts. In the instant case, the negligent act and resulting injuries occurred as an incident within the processes of serial unloading. Unloading and delivery were the hazards contemplated and within the facts of this case were the direct and primary cause of the injury. The accident and injury had a peculiar and necessary connection with the process and was intrinsically re-

lated to the use of the automobile. It arose as a natural and probable consequence of the unloading and delivery process.

In *Panhandle Steel Products Co. v. Fidelity Union Casualty Co.,* 23 S. W. (2d) 799 (Texas), the court uses language:

> "* * * since the act of unloading was one of the natural and necessary steps to the undertaking to deliver the beam, and followed in natural sequence, the use of the truck to that end, which use was specifically contemplated and covered by the policy, we believe that the conclusion is unavoidable, that the use of the truck was the primary and efficient cause of the injury, even though it should not be held to be the proximate cause, within the meaning of that term as employed in acts based on negligence of the defendants."

We refer further to the case of *Park Saddle Co. v. Royal Indemnity Company,* 81 Mont. 99, 111, 261 Pac. 880, where the policy of insurance insuring plaintiff against loss arising out of liability for bodily injury by reason of the maintenance and use, or maintenance or use of saddle or pack horses, the guide carelessly and negligently allowed the party to become lost and by reason of said fact, it was necessary to cross dangerous and steep mountain sides and inclines, and when so doing the tourist was required to dismount from the horses and to lead them. While so doing, one of the party slipped, caught her heel and fell, causing injury.

> "If it had not been for the saddle horses, the trip would not have been undertaken, and it was

by the use of the horses, and not otherwise, that the party arrived at the place of danger. As a protection, not only to the rider, but to the horse, it was deemed necessary for the rider to dismount and proceed on foot. The entire transaction grew out of, and the accident happened on account of, or by reason of, the use of horses, and it grew out of the use of the horses in the operation of the insured's business."

"* * * in this view it cannot be said he knew that the accident was not caused efficiently and proximately by the use of the horses and operation of the insured's business or, to follow the language of the policy 'by reason of the maintenance and use of saddle horses, in connection with the assured's business'."

In this connection see:

Mullen v. Hartford Accident and Indemnity Co., Supreme Court of Mass. 191 N. E. Rep. 394;

United Mutual Fire Ins. Co. v. Jamestown Mutual Fire Ins. Co., 242 App. Div. 420, 275 N. Y. S. 47.

CASES CITED BY APPELLANT ABUNDANTLY SUPPORT THE TRIAL COURT'S CONTENTION.

We consider that we would be remiss if we did not correct a misstatement in the appellant's brief on page 12, where he states that the trial judge neither cited nor relied upon any authority construing the policy. Appellant will recall that upon the trial of this case he cited all the cases herein cited and argued and

briefed all the authorities contained in the instant brief, and that they were most carefully considered. We have been cited no cases where accidents occurred as part of the delivery and unloading process that do not support the trial court's decision. To indicate this more clearly we have classified and distinguished these cases cited by appellant into three divisions:

AUTHORITIES CLASSIFIED AND DISTINGUISHED.

I. CASES WHERE, AT THE TIME OF THE ACCIDENT, THE PROCESS OF UNLOADING HAD ALREADY BEEN COMPLETED.

Luchte v. State Automobile Mutual Ins. Co., 197 N. E. 421, 50 Ohio App. 5 (1935). (Appellant's brief p. 19.) Plaintiff in this case was in the retail coal business and had, through an employee, delivered coal to a customer by dropping the coal in the street in front of the customer's house. He drove away and failed to leave any light or warning on the pile of coal. One Bell drove his motorcycle into the pile of coal and was killed. The negligent act alleged is leaving the pile of coal "unprotected and without lights or warning, contrary to a city ordinance". Apparently no loading clause was involved, mere use, ownership and intention.

Morgan v. N. Y. Cas. Co. (Ga. 1936), 188 S. E. 581. (Appellant's brief p. 20.) One Morgan operated a fuel company and insured its trucks, in the "transportation of materials and merchandise, including the loading and unloading". An employee in delivering coal through a chute in the sidewalk, left the chute

unattended. The complaint alleged the plaintiff fell into the coal chute after dark, and that the defendant coal company was negligent in having left the chute open, unguarded or without warning or red light. The coal truck was in no way mentioned or referred to in plaintiff's petition.

Stammer v. Kitzmiller, et al. (Wis. 1937), 276 N. W. 629. (Appellant's brief p. 21.) An employee of a brewing company, in using one of the trucks to deliver beer to a tavern, parked the truck alongside the curb, got out, opened a hatchway in the sidewalk; then he removed a barrel of beer from the truck and placed it either on the sidewalk or street pavement. He then lifted the barrel and put it through the hatchway into the basement of the tavern. After completing this and while he was engaged in having a sales slip for the beer signed inside the tavern, plaintiff fell into the open hatchway left unguarded by the employee. The coverage clause included "operation, maintenance or use (including transportation of goods, loading and unloading) of the automobile".

The court points out that considerable time had elapsed after anything was done which could reasonably be said to be connected with the actual unloading here.

Armour & Company v. General Accident, Fire & Life Assurance Corporation, Ltd. (Number 20,287-L; District Court of the United States, Northern District of California, Southern Division; decided November 2, 1939.) (Appellant's brief p. 18.) In this case an

employee unloaded hams from an automobile and by use of a small hand truck transported them into a market. It was customary for the proprietor of the market to weigh the hams before accepting delivery. On this occasion, however, the proprietor was absent at the moment, *and the delivery man went away and left the hams,* intending to return later to check the weight and pick up the invoice he had left. The delivery man was negligent in leaving the hand truck containing the hams in a dangerous place; and by reason of that negligence the customer of the market was injured. Clearly no active delivery was involved. The man had departed, the proximate cause of the injury was the leaving of the hand truck in a dangerous place.

Zurich General Accident & Liability Ins. Co., Limited, v. American Mut. Liability Ins. Co. of Boston, 192 Atl. 387, 118 N. J. Law 317 (1937). (Appellant's brief p. 15.) The delivery man rolled a can of milk into the back of a store where the proprietor had his ice box and lifted the milk into the ice box. He was servicing the ice box when the ice pick in his rear pocket caused injury. The court states:

> "The assured's servant was then engaged in the *servicing* of delivered milk upon Borer's premises, an act entirely disconnected with the unloading of the articles from the vehicle." (Italics ours.)

II. CASES WHERE ALTHOUGH PROCESS OF UNLOADING WAS INCOMPLETE AT THE TIME OF THE ACCIDENT, THE CAUSE OF THE ACCIDENT WAS BUT INDIRECTLY OR INCIDENTALLY RELATED TO THE USE OF THE VEHICLE OR THE UNLOADING THEREOF, OR WHERE ACCIDENT RESULTED FROM SOME ACT OR CIRCUMSTANCE ENTIRELY DISCONNECTED WITH SAID UNLOADING.

Franklin Co-Op. Creamery Ass'n v. Employers' Liability Assurance Corporation, et al. (Minn. 1937), 273 N. W. 809. (Appellant's brief p. 14.) An employee stopped his milk wagon in front of a building, filled his containers with milk bottles, and entered the building. After entering the building he walked about thirty feet to a freight elevator, set down his container, and then, for the purpose of using the elevator, pulled on the ropes or cables which controlled its operation. In so doing he injured a third person. The court held, at page 811:

> "The operation of the freight elevator wholly within the building, and remote from the wagon, solely for the driver's convenience in ascending to the third floor, had nothing whatever, in our opinion, to do with the 'use' of the teams or vehicles."
>
> "* * * however, it seems to us, that even assuming the word 'unloading' had a peculiar significance in the milk trade, in Minneapolis, yet by no stretch of the imagination could the court have contemplated the running of a freight elevator in no way connected with the milk company's business other than to house some of its customers, or that the policy could have been intended by either party to cover the operation of the freight elevators for the driver's sole convenience, accompanied as it was by a concededly extra hazard."

John Alt Furniture Co. v. Maryland Casualty Co., 88 F. (2d) 36 (Circuit Court of Appeals, Eighth Circuit) (1937). (Appellant's brief p. 17.) In this case the insured had been engaged in delivering furniture to a customer. In order to carry the furniture from the truck to the customer's apartment, it was necessary to remove the doors from the building. The door was leaned against a clothes pole on the property and blown by the wind, fell, causing injury to an occupant of the premises. The court rightly held that the causal chain was broken and that the accident arose out of a circumstance which was but incidentally related to the "unloading" process; that the unloading was not the direct and proximate cause of the injury. The appellant seeks to create the impression that the accident occurred before the unloading of the furniture had been completed (See pages 17-18 of the brief.) However, there is no justification for this implication. The court stated:

> "The door had been in this position about a half hour to an hour while the assured's employees were taking the furniture into the flat, when the wind apparently blew the door over and in falling the top of the door struck Lola Olsen, etc."

III. ANOMALOUS CASES WHICH ARE IRRELEVANT TO THE POINTS OR THE ISSUES HERE PRESENTED EITHER BECAUSE (a) A COMMERCIAL VEHICLE WAS NOT INVOLVED, OR (b) NO LOADING OR UNLOADING CLAUSE INVOLVED.

Jackson Floor Covering Co. v. Maryland Casualty Company, 189 Atl. 84, 117 N. J. Law 401 (1937). (Ap-

pellant's brief p. 13.) The language of exclusion from coverage in this case was:

> "Automobile, vehicle, or any draught or driving animal."

It was appellant's, Maryland Casualty Company's, point that a hand truck involved in the accident was a "draught vehicle" within the terms of the policy. However, the learned trial judge properly held otherwise.

Panhandle Steel Products Co. v. Fidelity Union Casualty Co., 23 S. W. (2d) 799 (Texas). (Appellant's brief p. 28.) This case involved the delivery of a structural steel beam at the purchaser's plant and:

> "While the beam of iron was being moved across the sidewalk into the building, and when about one-half the beam was off the truck, Miss Ida Godley happened to pass along the sidewalk and was injured. Insurance covered the truck for 'business and pleasure' and insured against loss from liability by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, either instantaneous or not."

The court reached the conclusion that the injury was the result of its use, irrespective of whether or not the word "maintenance" should be construed as having substantially the same meaning as the word "use".

We desire to call attention to the tendency of the courts to adopt a liberal construction in their interpretation of coverage provisions, in the case of *Merchants Co. et al. v. Hartford Accident and Indemnity*

Co., et al., Miss. Supreme Court (1939), 188 So. 571, the Merchants Company, while making deliveries to retail customers, one of its trucks went into a roadside ditch on a public highway and it was necessary to use several large poles in extricating the truck. When this was done the operator of the truck drove away, leaving the poles in the road. That night Grubbs, a traveler in a passenger automobile, struck one or more of the poles and was severely injured. The Merchants Company held an insurance policy obligating the insurer to pay all sums payable by reason of damages for accidental bodily injury to any person, arising out of the ownership, maintenance or use of automobiles:

> "Our conclusion, under a policy such as is here before us, is that where a dangerous situation caused injury either one of which arose out of or had its source in the use or operation of the automobile, the chain of responsibility must be deemed to possess the requisite articulation with the use or operation until broken by the intervention of some event which has no direct or substantial relation to the use or operation * * *"
>
> "* * * Certainly the use of the poles to extricate the truck from the roadside ditch was an event which arose out of, transpired in, and was necessary to, the operation of the truck * * * the next event which happened was that the truck drove away, leaving the poles in the road, but the poles were not left until the moment when the truck drove away."

RECENT CASE REJECTS APPELLANT'S THEORY.

We respectfully submit that the case of *State Brewing Company, et al. v. District Court,* 2nd Judicial District in and for Silver Bow County, et al., Supreme Court of Montana, March 11, 1940, 100 P. (2d) 932, is very similar in its facts with the instant case and correctly states the construction to be placed upon the provisions of the policy here involved. We believe this case merits careful reading as it is essentially on all fours with the instant case. The insured's policy covering beer delivery trucks was identical with the policy provisions in the instant case:

> "On May 3, 1938, the brewing company was engaged in delivering a barrel of beer to a place known as 'Clifford's' at 11 East Broadway in the City of Butte. The beer was about to be delivered into the basement through certain hinged doors in the sidewalk. On the day in question the beer had been taken from the brewing company's truck and placed upon the sidewalk. As plaintiff was walking along the sidewalk one of the servants of the brewing company, without warning to McCulloch, lifted the doors from underneath the sidewalk preparatory to lowering the beer into the cellar through the door. The door was lifted just as McCulloch stepped on it, and as a result he was injured."

The insurer declined to defend, contending:

> "* * * the use of the automobile had ceased, the unloading had been accomplished and the delivery of the beer to the customer had commenced, and since the delivery, undertaken after the beer had been removed from the truck, was a part of

the business of the brewing company and entailed no further use of the truck, the contract of the indemnity company, and not of the insurance company, protects the brewing company.

"There are cases involving similar facts though differing in some respects which by analogy support this view. Among such cases may be cited the following: *Stammer v. Kitzmiller,* 226 Wis. 348, 276 N. W. 629; *Franklin Co-op. Creamery Ass'n. v. Employers' Liability Assurance Corp.,* 200 Minn. 230, 273 N. W. 809; *Zurich General Accident etc. Co.,* 118 N. J. L. 317, 192 A. 387; *Caron v. American, etc., Co.,* 277 Mass. 156, 178 N. E. 286; and *John Alt Furniture Co. v. Maryland Casualty Co.,* 8 Cir., 88 F.2d 36."

The Supreme Court of Montana, after considering the cases cited by the appellant here, together with the instant case and the case of *Wheeler v. London, etc., Co.,* 292 Pa. 156, 140 A. 855, 856, stated:

"We hold that under the facts here presented the unloading of the truck was a continuous operation from the time the truck came to a stop and the transportation ceased until the barrel of beer was delivered to the customer. The unloading of the truck cannot be said to have been accomplished when the barrel of beer was placed upon the sidewalk. As well might it be argued that the loading of the truck consisted merely of the act of lifting commodities from the ground to the body of the truck. The loading of the truck would contemplate much more than that. It would embrace the entire process of moving the commodities from their accustomed place of storage or the place from which they were being delivered until they

had been placed on the truck. This being so, the insurance company policy has application. The court properly overruled the demurrer of the insurance company."

We submit that for the foregoing reasons the judgment of the District Court should be affirmed.

Dated, Oakland, California,
June 14, 1940.

JOSEPH J. YOVINO-YOUNG,
RUPERT R. RYAN,
Attorneys for Appellee
Mazilla Tighe.

No. 9473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY
(a corporation),
Appellant,

vs.

MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,
Appellees.

BRIEF FOR APPELLEES AH CHONG AND LEONG CHEUNG.

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Subject Index

Table of Authorities Cited

Statutes and Codes

Texts

No. 9473

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BRIEF FOR APPELLEES. AH CHONG AND LEONG CHEUNG.

A. STATEMENT AS TO JURISDICTION.

Appellant's statement as to jurisdiction appears to be correct and therefore requires no comment here.

B. STATEMENT OF THE CASE.

Appellant's statement of the case is also correct in every material detail. The second paragraph thereof on page 5 states the sole question involved herein correctly as follows:

> "The sole question involved is whether an accident which is the subject of an action in the State Court is within the coverage of an automobile policy issued by the plaintiff to the defendant Ah Chong. The policy was attached to the complaint and it insures against injuries arising out of the ownership, maintenance and use of an automobile (truck), and provided that the use included 'the loading and unloading thereof'."

As proved by the evidence and found by the trial Court, the circumstances which gave rise to the action in the State Court, briefly stated, are these: Leong Cheung was an employee of the insured, Ah Chong, and while so employed Leong Cheung made a delivery of vegetables to a restaurant known as Piccadilly Inn on Sutter Street, San Francisco, from the insured's commercial truck parked at the curb of Sutter Street, opposite and across the street from Piccadilly Inn; that, having made one delivery, Leong Cheung, while returning to the truck for a second delivery of vegetables, collided with Mazilla Tighe on the sidewalk (or is alleged to have collided with her), knocking Mrs. Tighe down and causing the personal injuries upon which the action in the State Court is predicated. (R. p. 67.)

As previously stated herein, the case turns on the question: Within the meaning of the policy of liability insurance was Leong Cheung engaged in "unloading" the truck at the time of the accident?

C. SPECIFICATION OF ERRORS.

Attention is directed especially to Appellant's first specification (Appellant's Opening Brief, p. 10), inasmuch as it sets forth a theory of the case highly unique, and, in the opinion of these Appellees, absolutely untenable for the reason that it is unsupported by any authority. This theory, expressed in Appellant's words, is:

> "That the delivery was complete and the employee at the time of the accident was returning to the truck, which at the time was parked on the opposite side of the street."

In other words, it appears to be Appellant's theory that, when a truck driver is unloading a truck, each trip to the place where the load is being deposited constitutes a complete unloading and the coverage of the automobile liability policy therefore cannot be extended to the driver's return trip to his truck for another installment of his load. This theory has two pronounced weaknesses: (1) It is illogical and technical to a high degree, and (2) it is absolutely unsupported by authority.

The remaining paragraphs of Appellant's Specification of Errors call for no more comment than will appear from time to time in the argument herein.

I.

THE JUDGMENT OF THE DISTRICT COURT IS AMPLY SUPPORTED BY THE AUTHORITIES CITED IN THE OPINION, THOUGH THERE IS NO LACK OF OTHER SPECIFIC CASES WHICH SUSTAIN THE JUDGMENT, AS WILL BE SHOWN IN ANOTHER SUBDIVISION OF THIS ARGUMENT.

On page 12 of its opening brief, in the first paragraph of its argument, Appellant criticizes the trial Court for failure to cite in its opinion adequate authority for its decision to the effect that the state action and injury in question are covered by the policy. Appellant says:

> "He neither cited nor relied upon any authority construing such a policy. The only cases cited by him were cases to the effect that, if the policy was ambiguous, it should be construed against the insurance company."

These Appellees contend that the authorities cited by the District Court in its opinion are ample to sustain the judgment, for the following reasons: The policy in question contains the provision that "Use of the automobile for the purposes stated includes the loading and unloading thereof". (R. p. 15.) Having these words in mind and recalling the circumstances of the accident, can it reasonably be said that extensive citation of authorities is necessary to support a finding that Appellant's policy herein covered the accident to Mrs. Tighe?

> "A policy or contract of insurance is to be construed so as to ascertain and carry out the intention of the parties, viewed in the light of the surrounding circumstances, the business in

> which the insured is engaged and the purpose they had in view in making the contract." (*Goss v. Security Insurance Company of California,* 113 Cal. App. 580, 298 Pac. 860.)

In the light of the foregoing citation may it not aptly be here inquired: When Appellant issued to Ah Chong its policy of commercial automobile insurance against liability incurred through use of the truck, including "the loading and unloading thereof" (R. p. 15), if it did not intend to insure against precisely such accidents as happened to Mrs. Tighe, what did it intend to insure against? The words "loading and unloading thereof" must mean exactly what they say, for they are too definite and specific to mean anything else.

And as to Ah Chong. Could he have foreseen the outcome, can it be imagined for an instant that he would have paid his good money for premiums on a policy destined to bring him a lawsuit rather than protection when his helper bumped a pedestrian on the sidewalk?

That the authorities cited by the trial Court in support of his opinion are ample for that purpose will appear from a few brief quotations therefrom:

> "As was said in Granger v. New Jersey Ins. Co., 108 Cal. App. 290, 291 Pacific 678, 700, 'A risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words'.
>
> Section 1644 of the Civil Code provides: 'The words of a contract are to be understood in their

ordinary and popular sense, rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed'.

In Moblad v. Western Indemnity Company, 53 Cal. App. 683, 200 Pac. 750, the court quotes from another case as follows:

'It is a fundamental rule that the language of a contract is to be accorded its popular and usual significance. It is not permissible to impute an unusual meaning to language used in a contract of insurance any more than to the language of any other contract'.

We take it that the ordinary and popular sense thus to be attributed to the words of a contract is to be related to the circumstances under which they are used, having in mind the purpose of the contract and the general situation which brought it into existence. In the case of Myerstein v. Great American Ins. Co., 82 Cal. App. 131, 255 Pac. 220, the court said:

'Where, then, the language may be understood in more senses than one, the rule of law is that an insurance policy is to be construed liberally in favor of the insured, and any uncertainty or ambiguity in the contract is to be interpreted most strongly against the insurer'."

Carl Ingalls, Inc. v. Hartford Fire Ins. Co., 137 Cal. App. 741, 31 Pac. (2d) 414.

In the second opinion cited by the trial Court when considering this point it is said of insurance policies:

> "One of the rules to be observed in the interpretation of contracts of this class is that they are to be liberally construed in favor of the insured, and all doubts or ambiguities resolved against the one who prepared the contract. * * * If the construction of language in an insurance policy is doubtful, the words, being those of the insurer, are to be taken most strongly against the company, and most favorably to the insured."
>
> *Mutual Life Ins. Co. v. Hurni Packing Co.,* 263 U. S. 167, 174, 68 L. Ed. 236, 237.

In addition to the foregoing authorities the judgment of the District Court is supported by a rule of law deducible, without material contradiction or variation, from the "loading and unloading" cases found in the reports. That is to say, from an analysis of all the "loading and unloading" cases cited in Appellant's Opening Brief and such others as have come to the attention of these Appellees, it will appear that coverage exists when, as here,

(1) The accident causing injury happens during progress of loading or unloading, and not after they (and more particularly unloading) have been finished; and

(2) When the injury is not the result of some entirely independent operation, such, for instance, as the manipulation of the ropes of a freight elevator by the insured, or his employee, as appears in *Franklin Cooperative Creamery Assn. v. Employers Liability Assur. Corp.,* 200 Minn. 230, 273 N. W. 809, cited and discussed on page 14 of Appellant's Opening Brief.

II.

APPELLANT HAS CITED NO AUTHORITY WARRANTING REVERSAL OF THE JUDGMENT HEREIN, WHICH IS IN HARMONY WITH A WELL ESTABLISHED LINE OF AMERICAN DECISIONS.

An examination of the authorities cited by Appellant in its opening brief will disclose no case which would support reversal of the judgment herein. Appellant appears to have adopted every "unloading" case in which the insurer prevailed as an authority in its behalf regardless of the fact that in cases of this character the accident causing injury either happened after unloading had been finished or was produced by the manipulation of some mechanical contrivance, such, for instance, as a freight elevator (*Franklin Cooperative Creamery Assn. v. Employers Liability Assurance Corp.,* 200 Minn. 230, 273 N. W. 809), or a falling door which had been removed from its hinges by furniture delivery men. (*John Alt Furniture Co. v. Maryland Casualty Co.,* 88 Fed. (2d) 36.)

Also, Appellant, on page 21 of its brief, endeavors to support its argument by a quotation from *Stammer v. Kitzmiller et al.,* 226 Wis. 348, 276 N. W. 629, and yet the quoted words state a rule which, applied to the facts of the instant case as distinguished from those of the *Stammer* case, supports the judgment herein in no uncertain terms. Having reference to a provision of the policy reading: "Operation, maintenance or use (including transportation of goods, loading and unloading) of an automobile", the opinion in the *Stammer* case says:

> "Losses and expenses imposed by law under the clause quoted does not carry the liability of the insurer beyond what may be described as the natural territorial limits of an automobile *and the process of unloading it.* (Italics ours.) When the goods have been taken off the automobile and have actually come to rest, when the automobile itself is no longer connected with the process of unloading, and when the material which has been unloaded from the automobile has plainly started on its course to be delivered by other power and forces independent of the automobile and the actual method of unloading, the automobile may be said to be no longer in use."

A brief review of Appellant's other authorities follows:

> *Jackson Floor Covering Company v. Maryland Casualty Company,* 117 N. J. Law 401, 189 Atl. 84. (Appellant's Opening Brief, p. 13.)

Appellant cites this case against itself, for it there contended that injuries to a third party caused when a roll of linoleum fell off a small hand truck were covered by an automobile liability policy. The linoleum had previously been delivered on a customer's loading and unloading platform by an automobile truck covered by another company than the Maryland, which carried the customer's general public liability insurance. The decision went against the Maryland on the ground that unloading had been completed and a new means of mechanical transportation begun

when the accident happened. The Court said (Appellant's Opening Brief, p. 13):

> "It appears that the unloading of the plaintiff's automobile truck had been completed and that the transportation from then on was by a different means; hence, there could have been no concurrent coverage, since the carrier insuring the automobile truck was under no obligation."

All of which was not true in the instant case.

Franklin Cooperative Creamery Assn. v. Employers Liability Assurance Corp., et al., 200 Minn. 230, 273 N. W. 809. (Appellant's Opening Brief, p. 14.)

A milk wagon delivery man injured a third person by negligently manipulating the ropes of a freight elevator in a building where he was delivering milk. The court held the injury was not covered by an automobile policy. Had Leong Cheung injured some one by carelessly operating Piccadilly Inn's freight elevator the District Court for the Northern District of California would doubtless have held likewise in the instant case.

Zurich General Accident Liability Ins. Co., Ltd., v. American Mut. Liability Ins. Co. of Boston, 118 N. J. Law 317, 192 Atl. 387. (Appellant's Opening Brief, pp. 15-16.)

This was an action between two insurance carriers to determine whether the injury in question was covered by the automobile policy or that

indemnifying for public liability. The case is not even persuasive in behalf of Appellant herein inasmuch as the Court found that the unloading had been completed when the accident occurred and the automobile liability carrier was therefore not liable.

This case follows the general rule hereinbefore set forth.

John Alt Furniture Co. v. Maryland Casualty Company, 88 Fed. (2d) 36. (Appellant's Opening Brief, p. 17.)

In this case a third person was injured by the falling of a heavy door which furniture delivery men had taken off its hinges. Again the Maryland Casualty Company, Appellant in the instant case, contends that the coverage was that of the automobile insurance carrier and not of itself, the public liability carrier. The accident obviously was not the result of the process of unloading and judgment therefore went against the Maryland, the public liability carrier.

Armour & Co. v. General Accident, Fire and Life Assurance Company, Ltd., No. 20,287L, U. S. District Court for the Northern District of California.

As analyzed on page 18 of Appellant's Opening Brief, this case will readily fall into the class of actions where injury was caused not while unloading an automobile, but as the result of negligently operating some mechanical contrivance after unloading was completed. It is therefore not in point herein.

Luchte v. State Automobile Mutual Ins. Co., 50 Ohio App. 5, 197 N. E. 421, cited on page 19 of Appellant's Opening Brief, *Morgan v. N. Y. Casualty Co.,* 54 Ga. App. 620, 188 S. E. 581, on page 20, and the *Panhandle Steel Products* case on page 28, add nothing to Appellant's argument. The two former cases are obviously not in point, and the last one, when read in its entirety, is more favorable to these Appellees than to Appellant.

"Automobile Liability Insurance", by E. W. Sawyer.

This book, quoted on pages 23-25 of Appellant's Opening Brief, is apparently a manual for liability insurance men. In the language of Appellant's brief "the coverage contemplated by the committee which drafted the policy" is stated therein. Appellant further says that "Mr. Sawyer's statement, which is quoted below, is in accord with the view of the Courts as to the scope of the policy". As to authorities of this class, it may be said that such generalizations are not and cannot be judicial precedents, if for no other reason than that they *are* generalizations.

While Appellees' counsel find in Mr. Sawyer's statement no pronouncement upon which a reversal of the judgment herein could be based, if such pronouncement existed it would be but (to use Mr. Sawyer's own language) "a reasonable practical interpretation adopted by some companies", or in Appellant's words "the coverage contemplated by the committee". Such matters are not legal precedents.

III.

FOR REVERSAL OF THE JUDGMENT APPELLANT DEPENDS UPON A THEORY OF ITS OWN INVENTION UNSUPPORTED IN LAW.

On page 29 of its opening brief Appellant says:

> "If the argument should be made that the unloading was not complete until the article unloaded came to rest, and that, therefore, the unloading of the article was not complete until delivered into the Inn, still the unloading and delivery of that article was complete at all events when it was so delivered. In returning, the person making the delivery was certainly not unloading."

Appellant could not, of course, consistently argue that a vegetable peddler carrying his wares from a truck to a restaurant kitchen is not engaged in "unloading" the vehicle. Such a contention would be without reason, without sense, and without regard for the English language. But, from the law of necessity apparently, Appellant has evolved a theory previously mentioned herein, to the effect that such a peddler is not "unloading" his truck within the meaning of the policy, when, having emptied a basket or deposited an armful of vegetables, he walks back to the vehicle for another installment of his wares.

Appellant cites no authority for this novel theory, and of course there is none. It would appear to come under the condemnation expressed in *Granger v. New Jersey Ins. Co.,* 108 Cal. App. 290, 291 Pac. 678, 700, and cited supra:

> "A risk fairly within contemplation is not to be avoided by any nice distinction or artificial refinement in the use of words."

IV.

ANALYSIS OF THE "LOADING AND UNLOADING CLAUSE" BY THE SUPREME COURT OF MONTANA.

Attention is directed to *State ex rel. Butte Brewing Co. v. Dist. Court, etc.* (Mont. Supreme), 100 Pac. (2d) 932, which is especially interesting for the reason that it follows the opinion of the District Court in the instant case as reported in 29 Fed. Supp. 69, and for the further reason that it contains a succinct analysis of the situation confronting insurer and insured under a policy containing the words "use of the automobile for the purposes stated includes the loading and unloading thereof" when an accident happens before "unloading" has been finished.

A barrel of beer from the brewery's delivery truck was placed on the sidewalk in front of "Clifford's", on East Broadway, Butte, Montana. One delivery man carried a package across the street to another customer. The second delivery man, preparatory to lowering the barrel of beer into "Clifford's" basement, went inside and down into the basement, where he unfastened a lock under two iron doors and raised one of them above the level of the sidewalk, injuring a pedestrian, Richard T. McCulloch. The opinion further states the case as follows:

> "Richard T. McCulloch brought an action in the District Court of Silver Bow County against the Butte Brewing Company for personal injuries. The brewing company requested the Standard Accident Insurance Company, hereinafter referred to as the insurance company, and the Occidental Indemnity Company, hereinafter

referred to as the indemnity company, to defend the action, which they were obligated to do if their respective policies, hereinafter referred to, covered the case; both declining to do so, an action was instituted in the District Court of the above named county by the brewing company against both the insurance and the indemnity company under the Uniform Declaratory Judgments Act (Secs. 9835.1 to 9835.16 Rev. Codes), to have determined whether the defendants therein, or either of them, were liable to defend the McCulloch action. The District Court overruled a demurrer to the complaint interposed by the insurance company [the commercial automobile liability carrier] and sustained a demurrer to the complaint interposed by the indemnity company. This proceeding is to determine the correctness of the lower court's ruling."

After analyzing the insurance policies involved, the opinion continues:

"The insurance company contends that under the facts alleged, which must be accepted as true for the purpose of the demurrer, the use of the automobile had ceased, the unloading had been accomplished and the delivery of the beer to the customer had commenced, and since the delivery, undertaken after the beer had been removed from the truck, was a part of the business of the brewing company and entailed no further use of the truck, the contract of the indemnity company, and not of the insurance company, protects the brewing company.

There are cases involving similar facts though differing in some respects which by analogy sup-

port this view. Among such cases may be cited the following: Stammer v. Kitzmiller, 226 Wis. 348, 276 N. W. 629; Franklin Cooperative Creamery Assn. v. Employers Liability Corp., 200 Minn. 230, 273 N. W. 809; Zurich General Accident etc. Co. v. American Mutual etc. Co., 118 N. J. L. 317, 192 Atl. 387; Caron v. American etc. Co., 277 Mass. 156, 178 N. E. 286, and John Alt Furniture Co. v. Maryland Casualty Co. (8 Cir.), 88 Fed. (2d) 36.

As before stated, all of the foregoing cases differ in some respects from the facts in the case before us. Another line of cases as nearly like this in facts as those above cited, sustains the opposite view. Before making reference to them we point out that the insurance company policy covers some liability when the automobile is not in actual use. Thus it specifically covers liability for injuries sustained in loading and unloading though obviously the truck is not in actual use in that process."

(The cases cited above, it will be noted, are quoted by Appellant in its behalf in the instant case with the exception of *Caron v. American, etc. Co.,* 277 Mass. 156, 178 N. E. 286.) The opinion then cites the case at bar (29 Fed. Supp. 69), *Wheeler v. London, etc.,* 292 Pa. 156, 140 Atl. 855, 856, and *Panhandle Steel Products Co. v. Fidelity etc. Co.* (Tex. Civ. Appeals), 23 S. W. (2d) 799, 801.

Continuing the opinion reads:

"We hold that under the facts here presented the unloading of the truck was a continuous op-

eration from the time the truck came to a stop and the transportation ceased until the barrel of beer was delivered to the customer. The unloading of the truck cannot be said to have been accomplished when the barrel of beer was placed upon the sidewalk. As well might it be argued that the loading of the truck consisted merely of the act of lifting commodities from the ground to the body of the truck. The loading of the truck would consist of much more than that. It would embrace the entire process of moving the commodities from their accustomed place of storage or the place from which they were being delivered until they had been placed on the truck. So, too, the unloading thereof embraced the continuous act of placing the commodities where they were intended to be actually delivered by use of the truck. This being so, the insurance company policy has application. The Court properly overruled the demurrer of the insurance company."

As to the indemnity company, the writ applied for was denied and the proceeding dismissed. As these Appellees stand in a position similar to that of the Butte Brewing Company in the Montana case and the facts are substantially the same in principle, it would appear that the judgment of the District Court herein holding Appellant liable was proper.

CONCLUSION.

In conclusion it is respectfully submitted that the trial Court did not commit error in finding that the State action and injury in question are covered by the policy, and that the judgment herein appealed from should therefore be affirmed.

Dated, San Francisco,
June 14, 1940.

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No. 9473

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APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Dictionaries

Other Authorities

No. 9473

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARYLAND CASUALTY COMPANY
(a corporation),
Appellant,

vs.

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APPELLANT'S REPLY BRIEF.

Two briefs have been filed herein by appellees, one for the appellee Mazilla Tighe, and the other for the appellees Ah Chong and Leong Cheung. The brief on behalf of Ah Chong and Leong Cheung attempts to establish that the carriage of the goods after they were removed from the truck constituted "unloading", as was held by the trial judge; but the brief of Mazilla Tighe attempts to argue that the carriage of goods after unloading is covered by a recital in the policy defining transportation *or delivery* of goods to be commercial. This contention is new to us and was not the basis of the decision below, and we will therefore separately review these two briefs.

REVIEW OF BRIEF OF MAZILLA TIGHE.

1. Appellee states at the bottom of page 5 and the top of page 6 of her brief that the policy indemnified the insured against losses arising out of the *use* of the truck, and specifically defines "use to include not only *'unloading'* but also *'delivery'* of merchandise transported by the insured vehicle".

This is far from correct. What the policy in fact specifically provides is that it covers accidents "arising out of the ownership, maintenance, or use of the automobile" (R. p. 16), and that "use of the automobile for the purposes stated includes the loading and unloading thereof". (R. p. 15.)

2. Appellee relies on certain general "definitions" contained in the policy. The policy is so printed that it may be made applicable either where the automobile is used (a) for pleasure and business, or (b) for commercial use, and these terms are defined. This policy was for commercial use and the term "commercial" is defined therein "as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named insured's business occupation * * *" (R. p. 15.) This does not mean that the policy covers all transportation or delivery of goods in connection with insured's business, but the use of the truck for the transportation or delivery of goods. This is made clear by the provision for "coverage" which is limited to accidents "arising out of the ownership, maintenance or use of the automobile". (R. p. 16.) The words "transportation or delivery" are used because

the word "delivery" is better suited to goods sent out, while "transportation" is broad enough to include goods coming to the place of business. Neither word extends the policy to transportation or delivery *except by the automobile.* This is made clear by the express provision of the policy that "use of the automobile for the purposes stated [transportation or delivery] includes the loading and unloading thereof". (R. p. 15.)

Counsel again on page 6 of their brief say that "unless the phrase *'delivery of goods, merchandise or other material',* is utterly meaningless and nugatory, the policy, *by its express terms,* protects the insured against losses arising out of the unloading and delivery of merchandise, both of which are specifically defined herein as *uses* of the automobile". We see no call for this dilemma. One provision is that "transportation or delivery" is commercial. The other provision is that "loading and unloading" is a use of the truck. Of course, the use of the truck to transport or deliver goods is a use of the truck and no special provision to that effect was necessary. In referring to "transportation or delivery" the policy had no reference to a delivery after the goods had been unloaded, that is, a delivery made not by the use of the truck but by some other means. We submit, therefore, the sole question is, did the accident arise out of the unloading of the automobile? If counsel would meet this issue there would be no necessity to be troubled by "physical abstractions" (whatever they are) or "aura of mysticism".

3. On page 11 of the brief appellee charges us with a misstatement in stating that the trial judge neither cited nor relied upon any authority construing such a policy. We were referring to the opinion of the judge in the record which speaks for itself. (R. p. 56.)

4. On page 12 in attempting to distinguish the *Luchte* case counsel state: "Apparently no loading clause was involved, mere use, ownership and *intention*". We know of no case which has held that loading and unloading is not included in the use of the automobile. On the contrary, it is expressly held that without special provision to that effect loading and unloading is included. (*Panhandle Steel Products Co. v. Fidelity Union Casualty Co.*, 23 S. W. (2d) 799.) The decision in the *Luchte* case is based on the ground that the unloading was complete when the material was removed from the truck.

5. On page 13 they attempt to distinguish the *Morgan* case on the ground that the truck was not mentioned in the petition. The complaint of Tighe in this case did not need to refer to the truck. All she had to allege was that the defendants negligently ran into her. The liability of the insurer must depend on whether the facts established upon issues framed in the action on the policy bring the case within the policy.

6. On page 13 counsel apparently approve the *Stammer* case, but attempt to distinguish it on the time elapsing between the removal of the goods from the truck and the accident. If lifting the beer from the sidewalk, opening the hatchway and putting the

beer through the hatchway was included in "unloading", it would seem that leaving the trap open was incidental to the unloading,—certainly much more so than the alleged negligence of the boy in this case after both unloading and delivery were complete. The decision was in fact placed on the ground that the unloading was complete when the beer was taken off the truck and placed on the sidewalk.

7. On page 13 counsel apparently approve the *Armour* case where in making *delivery* the truck driver negligently left a hand truck in a dangerous place. Here again, if *delivery* was part of unloading, the leaving of the hand truck was incidental to the *delivery* and therefore to the unloading. The fact that the accident occurred later would not seem to be material. Counsel say "clearly no active delivery was involved". Certainly the use of the hand truck was part of the delivery much more than the return of the boy in this case.

8. As to the *Zurich* case, counsel stress the statement of the Court that the delivery man was "engaged in the servicing of delivered milk". What he was actually doing was making the delivery of milk and ice to the accustomed place, which was apparently the customer's icebox. Counsel say he was "servicing the icebox". He was servicing it by making the delivery of milk and ice to that point. It seems to us that if the carriage of goods to their final resting place by the operators of the truck is included in unloading, it is immaterial to what particular place on the customer's premises the delivery is made.

9. On page 15 counsel apparently approve cases which have denied a recovery even where the process of delivery was not complete, but as they say "the cause of the accident was but indirectly or incidentally related to the use of the vehicle or the unloading thereof, or where accident resulted from some act or circumstance entirely disconnected with such unloading". They apparently approve the holding in the *Franklin* case that the use of an elevator in making a delivery "had nothing whatever, in our opinion, to do with the 'use' of the teams or vehicles". So we say the skylarking actions of the boy after unloading and delivering articles had nothing to do with the use of the truck.

10. On page 16 they approve the holding in the *John Alt Furniture* case, where in *delivering* furniture a door was removed and caused an injury. Counsel deny the implication of our brief that the act which was the basis of the injury occurred before the unloading of all the furniture was complete. Certainly the very words which counsel quote prove that fact. After the door was removed the men carried furniture from the truck through the door for half an hour when the accident occurred.

11. Counsel apparently approve the decision in the *Jackson* case, but the decision in that case would have been otherwise if it was held that the goods were not unloaded until they were delivered. In that case the floor company backed the truck up to a loading platform and there unloaded the linoleum upon a small hand truck for complete delivery of the linoleum to a

designated place in the building, and while the linoleum was being carried by the hand truck to its final resting place the accident happened, and the basis of the decision was that the unloading was complete when the material was placed on the platform and the further act of carriage by the hand truck was no part of unloading. As we have pointed out, the fact that the carriage in the case at bar was by hand rather than by hand truck does not change the situation. The unloading was complete when the goods were removed from the truck.

12. Counsel refer to the *Panhandle* case. We only cited that case to point out that it was held that the use of the automobile included loading and unloading, even when the policy did not specifically so provide, and in support of our contention that, as a matter of fact, the provision regarding loading and unloading adds nothing to the policy.

13. We see no analogy between the case at bar and the *Merchants Co.* case cited on page 17. Any act necessary in the use and operation of the truck is covered by the policy, and we do not consider that the Court was liberal in its holding that the act in question was necessary. We have all done about the same thing. But as we have pointed out, the opening of the trap door, the running of the elevator, the removing of the door, the use of the hand truck were all reasonably necessary in making *delivery,* but were held not to be connected with the use of the truck or as any part of unloading.

14. We do not deem it proper to comment on the *Butte Brewing Company* case cited on page 19, as that decision is based entirely on the decision here under review. However, the act there involved was at least part of the *delivery;* here the act involved occurred after delivery had been made. In fact the Court there said:

> "We hold that under the facts presented the unloading of the truck was a continuous operation from the time the truck came to a stop and the transportation ceased *until the barrel of beer was delivered to the customer.*"

Even on this test the unloading ceased when the vegetables were delivered to the customer.

In the foregoing review we have not referred particularly to two cases cited in this brief:

The first is *Panhandle Steel Products Co. v. Fidelity Union Casualty Co.,* 23 S. W. (2d) 799 (Texas). In that case an injury occurred while a steel beam was being unloaded from the truck and one end of the beam was still on the truck at the time. It does not therefore seem to be in any way in point in this case.

The other case is *Park Saddle Horse Co. v. Royal Indemnity Company,* 81 Mont. 99, 261 P. 880. This was not an automobile case, and we do not consider that the case is at all in point. According to the statement of appellees, the policy insured against injury growing out of the use of saddle or pack horses, and saddle and pack horses were being used, but on account of the condition of the country "it was necessary to

cross dangerous and steep mountain sides and inclines and when so doing the tourists were required to dismount from the horses and to lead them. While so doing one of the parties slipped, caught her heel and fell, causing injury". We do not think that the case at bar would be aided one way or the other by a discussion of whether the horse was being used when the rider temporarily, on account of the condition of the country, dismounted and led the horse. However that may be, it might be noted that in an able article by John A. Appleman, published in Volume 25, American Bar Association Journal, page 302, that case is referred to as one of the decisions which "do not represent the usual doctrines but are merely freakish and wayward results; in many instances such result being the only out-of-line decision of courts which have constantly rendered excellent and well-reasoned opinions". The case is severely criticised in that article.

REVIEW OF BRIEF OF AH CHONG AND LEONG CHEUNG.

1. This brief correctly states the claim upon which the appellees must rely, namely, that the delivery and return from delivery is part of unloading. (p. 2.) They in no way rely upon the provision of the policy reciting that transportation or delivery of materials is commercial. They fail, however, to distinguish between the two claims made by appellant, namely, (1) that delivery is not part of unloading, and (2) that return from delivery is not part of unloading.

2. Appellees admit that there is no basis for the application of the rule referred to by the learned trial judge that an ambiguous policy is to be construed against the insured, because they state:

> "The words 'loading and unloading thereof' mean just exactly what they say, for they are too definite and specific to mean anything else."

Counsel ask if this policy did not cover this accident, what did it intend to insure against? The answer is clear. Motor vehicles kill or injure thousands of people every year and do untold damage to property. These accidents may happen when the vehicle is improperly parked. Or goods may fall from it and cause injury. Or an injury may arise from the removal of goods from a truck. So the policy was made broad enough to cover the use of the automobile including the loading and unloading of it. It was not a general public liability policy. Such a policy was open to the insured, insuring him for all injuries caused by his employee, or caused in the process of delivering goods. He got no such policy from appellant.

The insurer is not in any way bound by any arrangement, express or implied, between the insured and his customers. They cannot extend the liability beyond unloading by any arrangement by which the insured is to deliver or do any act after unloading. They might agree that the truck owner should, after unloading, carry the goods by hand, or by hand truck, or by elevator, or through chutes, through dark halls, into basements, up stairways, in elevators, or escala-

tors, into iceboxes, or refrigerators, and might even go further and require some degree of service, or packing, or storage of the unloaded material. None of these things would be covered by the policy.

Or the truck driver might incur some duty and liability *after the unloading* due to the manner in which such unloading was made or the place where the goods were unloaded. Thus, the duty to place lights on the goods if deposited on a street, would be a liability for breach of a public duty following unloading and would not be covered by the policy.

The multitudinous things which might happen in the course of such activities must necessarily come within public liability policies, workmen's compensation policies, or other like coverage, and cannot come within the coverage of a policy limited to the use, maintenance and operation of a truck, including the loading and unloading thereof. *Expressio unius, exclusio alterius* is the principle here applicable. If the parties had intended that carriage or other act after unloading was to be covered, they would have so provided.

If we follow the argument of counsel that words are to be given their popular and usual meaning, how can unloading be extended to include some carriage of the goods, not by the truck, but by hand, hand truck, elevator, or otherwise, *after they have been unloaded?*

The dictionary definitions of the verbs "load" and "unload" are in accordance with our argument and the cases we have cited as to the meaning of the

words "loading and unloading" as used in the policy. The words are defined as follows:

Webster's New International Dictionary, Second Edition, Unabridged, 1934:

load, verb.

"Transitive: 1. To lay a load or burden on or in, as on a horse or in a cart; * * *.

2. To place on or in something, as for carriage; as, to load a cargo of flour; to load hay."

unload, verb.

"Transitive; to take the load from; to discharge of a load or cargo; to disburden; as, to unload a ship; to unload a beast."

The New Century Dictionary:

load.

"1. tr. To put a load on or in (as, to load a beast of burden, a cart, or a vessel); * * * also, to place on or in something for conveyance (as, 'We * * * fetched our luggage and loaded it * * * into the canoes': DeFoe's 'Captain Singleton', v.); * * *."

unload.

"1. tr. To take the load from; remove the burden, cargo, or freight from; * * *."

3. On pages 8-9 counsel apparently approve the rule which they quote from the *Stammer* case, which seems to us to be clearly right and which also seems to show that where Leong Cheung took the goods off of the truck and plainly started on his course to deliver the produce by other power and forces inde-

pendent of the truck and the actual method of unloading, the truck may be said to be no longer in use.

4. On pages 9-10 in reviewing the *Jackson Floor Covering* case counsel distinguish between a delivery after unloading by mechanical means and a delivery by hand. We can see no difference. Nor does it matter that by express or implied arrangement between the insured and his customer the insured carries the goods after unloading, instead of the goods being carried by some third person. In most of the cases we have cited the carriage was by the insured, but such carriage after unloading was held to be not covered.

5. On page 13 counsel say we could not claim that carriage of goods after unloading is not covered by the policy. We do so claim, but also claim, as stated by counsel, that after both unloading and subsequent carriage are complete, the act of returning to the truck is not unloading.

6. Appellees have not cited any case supporting their right to recover. All that appellees have done is to criticize or attempt to distinguish the cases cited by us in which it was held that no recovery could be had. The only exception to this is the *Montana* case in which we claim the Court has erroneously followed the decision in the case at bar.

In this brief appellees incidentally refer to two cases which should be noted, the first being *Wheeler v. London, etc.,* 292 Pa. 156, 140 Atl. 855. In that case a steel beam was intended to be unloaded inside a garage.

However, it was unloaded so that it was partly on the sidewalk, and the party sent for a block and tackle, intending to use the insured truck for the purpose of lifting the girder into the garage. Under these circumstances the Court held that the truck was in use at the time. While we believe that a majority of the Court confused unloading and delivery, the peculiar situation growing out of the intended use of the truck entirely differentiates the case from the case at bar. It should also be noted that two judges dissented, in which they pointed out that the *previous* use of the truck and the *intended future* use were entirely immaterial.

The other case cited is *Caron v. American etc. Co.*, 277 Mass. 156, 178 N. E. 286. It is hard to understand why the appellees have specially referred to this case, because in that case it was held that the accident was not covered by the policy. In that case in unloading ice certain of the ice fell on the crosswalk and a pedestrian stepped on it and was injured. It was held that the ice having been removed from the truck, the injury did not arise out of the use of the truck. It should be noted that the Court also pointed out that the policy did not cover accidents growing out of delivery after the ice was removed from the truck. In fact, the case is one of the most extreme cases in which the Court has denied recovery.

CONCLUSION.

Counsel have charged us with refinements, etc. So far as we are concerned, we rely on no refinements. We say that unloading is removing the produce from the truck and that anything after that is carriage or delivery by means other than the truck, which is not covered by the policy; but in view of the contention of appellees, which we deem unfounded, that carriage and delivery after removal from the truck, no matter how remote from the truck, constitute unloading, we make the further contention that even if that were true, which we deny, the incidental act of the person making the delivery when returning after delivery is no part of unloading, is disconnected from the use of the truck, and does not constitute an injury arising out of the use of the truck.

Dated, San Francisco,
June 24, 1940.

Respectfully submitted,
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No. 9474

United States

Circuit Court of Appeals

For the Ninth Circuit.

9

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

JOE CONWAY,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index Page

Index Page

Index Page

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In the District Court of the United States
in and for the District of Arizona

No. Civ. 31-Phx.

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff,

vs.

JOE CONWAY,

Defendant.

COMPLAINT FOR DECLARATORY RELIEF

To the Honorable, the District Court of the United States, in and for the District of Arizona:

Southern Pacific Company, a corporation, presents this, its verified Complaint for Declaratory Relief, against the defendant, Joe Conway, and for cause of action complains and alleges as follows:

I.
Status of the Parties

(a) Plaintiff now is, and at all times herein mentioned has been, a corporation duly organized and existing under and by virtue of laws of the State of Kentucky, and a citizen and resident of that State. Plaintiff now is, and at all times herein mentioned [4] has been, engaged in the operation, as a common carrier in interstate commerce, of lines of railroad, situated in the States of Oregon, California, Nevada, Utah, Arizona, Texas and New Mexico, and in the transportation of passengers and property from, to, and between points in each and all

of said states. At all times herein mentioned plaintiff, as such interstate common carrier by railroad, has been and now is subject to the provisions of the Act of Congress approved February 4, 1887, and acts amendatory thereof and supplementary thereto, known as the Interstate Commerce Act.

(b) Defendant, Joe Conway, is sued herein as an individual, and not in his official capacity. Said defendant is a citizen of the State of Arizona, residing in the City of Phoenix, County of Maricopa, in said state, and is the duly elected, qualified and acting Attorney General of the State of Arizona. As such, under the Constitution and laws of that state, there is vested in him the exclusive power, and upon him is imposed the mandatory duty, to commence and prosecute and to direct the institution and prosecution of, suits for penalties for every violation of the Arizona Train-Limit Law, the statute the validity of which constitutes the subject-matter of the instant controversy.

II.

Jurisdiction.

The grounds upon which the jurisdiction of this Court depends are as follows:

(a) This is a civil suit, in the nature of a suit in equity, between citizens of different states, whereof the District Court of the United States for the District of Arizona has original jurisdiction, and is a suit for a declaratory judgment and decree, pursuant to the provisions of the Federal

Declaratory Judgment Act of 1934 (28 U. S. Code, Section 400), and presents an actual [5] controversy between the plaintiff and the defendant as more fully appears hereafter, which may be finally adjudicated and determined as between said parties;

(b) The matter in controversy greatly exceeds, exclusive of interest and costs, the sum or value of Three Thousand (3,000) Dollars; and the value of the right of the plaintiff herein sought to be declared, preserved and maintained, to wit, the right of the plaintiff to operate within, as well as into and out of, the State of Arizona, interstate trains consisting of more than 70 freight or other cars, exclusive of caboose, and interstate passenger trains consisting of more than 14 cars, greatly exceeds the sum of Three Thousand (3,000) Dollars.

(c) This suit arises under the Constitution and laws of the United States, in that plaintiff seeks herein, pursuant to subsections 1 and 14 of Section 41 and Section 400, of Title 28 of the United States Code, to obtain the final judgment and decree of this Court, adjudging and declaring that that certain statute of the State of Arizona hereinafter set forth, known as the Arizona Train-Limit Law, which statute prohibits, under severe penalties, the operation in said state of railroad trains containing more than 70 freight or other cars, exclusive of caboose, and of passenger trains containing more than 14 cars, is void, invalid and unenforceable, because repugnant to and in conflict with the Due-Process Clause of

the Fourteenth Amendment to, and the Commerce Clause of, the Constitution of the United States, and the Interstate Commerce Act and related acts of Congress hereinafter more specifically referred to;

(d) The damage and injury which plaintiff daily and proximately sustains and will continue to sustain by reason of said statute are and will be *of* great and irreparable; but by reason of the provisions thereof, plaintiff cannot safely disregard the same and await prosecutions thereunder for the purpose of [6] testing the validity thereof, and is wholly unwilling to do so, because of the enormous penalties that would shortly accrue if such a course were followed and said law sustained; and also by reason of the narrow scope of the evidence, in criminal proceedings, and the multiplicity of suits, and the procedural difficulties which would be encountered, in suits at law.

(e) In addition to the foregoing general statement, the facts, circumstances and conditions hereinafter set forth in this complaint for declaratory relief justify and necessitate the exercise of the jurisdiction of this Court to afford unto plaintiff the declaratory relief herein prayed for, and such other relief as may be meet in the premises.

Wherefore, this Court is now vested with appropriate jurisdiction and power to declare the rights, duties, powers, obligations and legal relations of the parties interested herein as the same may be affected by said Arizona Train-Limit Law; and said parties are entitled to such declaration, the same to have

the force and effect of a final judgment and decree and to be reviewable as such.

III.

Description of Plaintiff's Lines of Railroad.

Plaintiff's main lines extend from San Francisco, California, to Portland, Oregon, and across the State of Nevada to Ogden, Utah; and extend also from San Francisco, southeasterly to Los Angeles, California, and thence to Yuma, Arizona, and thence across the southern part of the States of Arizona and New Mexico, via El Paso, Texas, to Tucumcari, New Mexico. At each of said points other than Yuma, as well as at numerous other points, plaintiff's lines connect with the lines of other interstate rail carriers, and thus enter into and become part of through routes for the transportation of freight and passengers between all parts of the United States, and to and from adjacent [7] foreign countries.

The major portion of the interstate freight traffic transported by plaintiff across or partly in Arizona over its southern Arizona route is handled by way of the main line which extends through Indio, California, Yuma, Maricopa and Tucson, Arizona, and Lordsburg, New Mexico, to El Paso, Texas. Plaintiff also has an alternate main line, which departs from the Yuma-Maricopa-Lordsburg line just described at Wellton, Arizona, and runs thence northeasterly to Phoenix, Arizona, and thence southeasterly to Picacho, Arizona, where it joins the Yuma-

Maricopa-Lordsburg line. A second alternate main line of the plaintiff leaves the Yuma-Maricopa-Lordsburg line at Mescal, Arizona (about 30 miles easterly from Tucson) running thence via Douglas, Arizona, to El Paso, Texas. The three lines of the plaintiff just described, considered together, afford to it practically two lines for the entire distance from Yuma to El Paso; but, except for short stretches of double-track near Yuma, Phoenix, and El Paso, and a double-track district about 43 miles in length between Stockham and Mescal, Arizona, these lines are operated as single-track lines.

Passenger traffic which originates in or crosses Arizona uses all these lines; but because the route between Yuma and Tucson via Phoenix is somewhat longer than via Maricopa, through interstate freight trains between Yuma and Tucson are generally routed via Maricopa. Between Tucson and El Paso, about 65 per cent of the through interstate freight traffic is moved via Lordsburg, and about 35 per cent via Douglas.

Plaintiff's main lines cross southern Arizona and New Mexico on comparatively light grades and through much level territory. They are well constructed, according to the best modern railroad standards, and capable of sustaining the heaviest and most powerful locomotives owned or operated by plaintiff. They are [8] equipped throughout with automatic block signals, and numerous other devices promoting safety of operation. The operating conditions upon said main lines generally are

relatively favorable to speed, safety, and economy of operation.

The operating conditions upon plaintiff's main lines across Nevada and Utah are closely similar to those upon the main lines across Arizona and New Mexico. Said lines in Nevada and Utah are well constructed, according to the best modern railroad standards, and are equipped throughout with automatic block signals and numerous other devices promoting safety of operation.

IV.

History and Text of the Act Complained Of.

On May 16, 1912, the Governor of the State of Arizona approved an act of the Legislature of that State entitled "An Act limiting the number of cars in a train", which act was afterwards, on referendum at a general State election held November 5, 1912, approved by a majority of the voters of said State voting at said election (Laws, 1913, Referendum, p. 15; Sections 2166-2168, Revised Statutes of Arizona, 1913; Civil Code of Arizona, Section 647, Arizona Revised Statutes, 1928), and ever since has been and now is in full force and effect. Said act has no preamble, and reads as follows:

> "Section 1. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, their, or its line of road, or any portion thereof, any train consisting of more than seventy freight, or other cars, exclusive of caboose.

"Section 2. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, [9] their, or its line of road, or any portion thereof, any passenger train consisting of more than fourteen cars.

"Section 3. Any person, firm, association, company or corporation, operating any railroad in the state of Arizona, who shall wilfully violate any of the provisions of this act, shall be liable to the state of Arizona for a penalty of not less than one hundred dollars, nor more than one thousand dollars, for each offense; and such penalty shall be recovered, and suits therefore brought by the attorney general, or under his direction, in the name of the state of Arizona, in any county through which such railroad may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals.

"Section 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

V.

Effect of the Law Upon Plaintiff's Freight-Train Operations.

(a) Railroad operating conditions, both on plaintiff's lines in Arizona, and elsewhere, and on railroads throughout the United States generally, differ substantially from the operating conditions which existed in 1912, when the Arizona Train-

Limit Law was passed, in that since 1912, and more especially since 1920, great improvements have been made in both road and equipment. Tracks, roadbeds, and bridges have been made stronger; grades and curves have been reduced or eliminated; side tracks and passing tracks have been lengthened; block signals and other safety devices have been installed; safer and more powerful locomotives, and stronger freight and passenger cars have been built and acquired. The greater part of these improvements has taken place since 1920, and has been accomplished by the ex- [10] penditure of large sums of money, which expenditures in many instances have been sanctioned by the Interstate Commerce Commission, under Section 20a of the Interstate Commerce Act. This is particularly true with respect to the acquisition of large and powerful locomotives designed and used for the handling of trains consisting of more than 70 freight cars, or more than fourteen passenger cars. These and other expenditures have been made largely for the purpose of increasing the lengths and the loading of trains, and promoting the safety of handling thereof, so as to bring about and maintain safer and more efficient and economical operations.

(b) The locomotives and cars now used on plaintiff's main lines in Arizona, and elsewhere, have been greatly and continually improved since 1912, and have thus been made stronger and better able to withstand the most arduous and serious conditions. The standard locomotives generally used by

plaintiff at the present time have been and are built with heavier frames and running gears, improved and strengthened brake equipment, draft gears and attachments, and air pumps of increased capacity. The boilers also have been much improved; and many if not all of such locomotives are equipped with feed-water heaters, super-heaters, and other modern devices designed to promote safety, efficiency and economy in operation.

The freight and passenger cars used in plaintiff's trains in the State of Arizona have likewise been greatly improved since 1912, and particularly since 1920. In 1912 about 40 per cent of the freight cars of the plaintiff were equipped with wooden underframes; that type of car has now been entirely withdrawn from main-line and interchange service, and all freight cars now used in such service are equipped with steel underframes. Modern draft gears and modern standard single-plate cast-iron wheels have been installed upon plaintiff's freight equipment. [11] Improvements have been made in the air-brake triple-valves in such freight cars, the result of which is practically to eliminate unintended emergency-brake applications.

(c) Since 1920 plaintiff has spent approximately $9,000,000.00 in Arizona, primarily for the purpose of improving its tracks, track facilities and terminals, and in installing block signals and other safety devices. Plaintiff has also invested about $13,000,000.00 further in Arizona, since 1920, in the rehabilitation, construction, and reconstruction of

the alternate main line from Wellton through Phoenix to Picacho, heretofore described. The track, roadbed, and bridges on the plaintiff's main lines in Arizona and elsewhere are capable of carrying the heaviest locomotives owned by said plaintiff; and there is no reason, from the standpoint of climatic conditions, or track, grades, or curvatures, or the strength or capacity of road and equipment now owned and available, why the plaintiff could not at once commence the operation, on its main lines in Arizona and in the adjacent states of California and New Mexico, where the Arizona Train-Limit Law operates to restrict the length of trains, of a very substantial number of freight-train units of substantially more than 70 freight or other cars, and passenger train-units of substantially more than 14 passenger-cars, and thus operate its lines of railroad in said territory more safely, efficiently, and economically, and in line with the best modern railroad practices, and thereby secure the benefits of immediate, substantial, and much-needed operating economies.

(d) Prior to 1912, freight trains containing more than 70 cars were operated mostly on favorable grades, or consisted in whole or in large part of empty cars. Principally by reason of improvements in roadbed, equipment, and operating methods, made since that time, heretofore described in part, the operation of through trains containing more than 70 freight or other [12] cars,

either loaded or empty cars or both, on main trunk lines, including those of plaintiff, has become and ever since about the year 1924 has been, and now is, the common standard railroad practice throughout the United States, except in Arizona, and the adjacent portions of California and New Mexico where the Arizona Law operates with extraterritorial effect; and the maximum lengths of such freight trains, outside of Arizona, are very much greater than those permitted in said state.

Except in Arizona and adjacent territories affected by said Train-Limit Law, freight is now transported between all parts of the United States, in trains of more than 70 cars, upon dependable schedules; and such schedules are one-half to one-third faster than prevailed prior to 1924. Such common standard operation of freight trains of more than 70 cars, upon such faster schedules, has made possible the nationwide distribution and consumption of the perishable and other products (including livestock) of California and Arizona, as well as other states and localities, and moving in interstate and foreign commerce over the lines of plaintiff and its railroad connections.

Trains of greater lengths than 70 freight or other cars are handled by locomotives of modern type, of which those owned and operated by the plaintiff are typical, whose runs now extend for several hundred miles, in many cases passing through or across two or more states. The efficiency and economy of operation of such locomotives depend upon the ex-

tent to which the trains which they handle are heavy enough so that their tractive power may be utilized to the fullest practicable extent. The improved methods of operation, of which the operation of trains of more than 70 cars is an essential part, have practically eliminated car shortages, which were frequently experienced prior to 1924, and have made it possible to reduce greatly the stocks of merchandise formerly required to be carried in order [13] to protect against traffic congestion and delay: all of which has been of great benefit to the commerce of the country, and particularly to the states and communities served by plaintiff's lines, which is and are largely dependent upon prompt, efficient, and reliable railroad transportation at reasonable rates.

(e) The operation of freight trains containing substantially more than 70 freight or other cars, exclusive of caboose, and of passenger trains containing substantially more than 14 cars, subject to the requirements of traffic (which method of operation is herein, for convenience, referred to as "standard long-train operation"), is a general practice on the main trunk lines of all the major steam railroads throughout the United States, and on the main lines of railroad of the plaintiff, and its principal competitors and connections, except in Arizona and contiguous territory where the Arizona Train-Limit Law has extraterritorial effect. The operating conditions under which such standard long-train operation is carried on are substantially as favor-

able, generally speaking as those on the main lines of the plaintiff in Arizona. The practice of such standard long-train operation has not retarded and does not retard, but on the contrary expedites materially the movement of the traffic carried therein, and does not delay, but on the contrary promotes and makes possible the early delivery of such traffic.

Freight trains of more than 70 freight or other cars, exclusive of caboose, and passenger trains of more than 14 cars, are commonly, safely, and economically operated through the United States, outside of Arizona, over lines of railroad substantially similar to the main lines of the plaintiff in Arizona; and there is no reason, from the standpoint of safety, or otherwise, why the length of plaintiff's freight or passenger trains in Arizona should be limited as required by the Arizona Train-Limit Law.

(f) By its terms the Arizona Train-Limit Law applies to [14] and regulates trains only within Arizona. However, it is wholly impracticable to split up or consolidate trains at state boundary lines, unless terminals are there located. While plaintiff has a terminal at Yuma, adjoining the California-Arizona boundary line, its nearest New Mexico terminal upon the Yuma-Maricopa-Lordsburg line is at Lordsburg, New Mexico, about 23 miles east of the Arizona line. Upon the Tucson-Douglas-El Paso line there is no terminal between the Arizona-New Mexico boundary, and the terminal at El Paso, Texas, about 166 miles east of said boundary. No facilities now exist at or ad-

jacent to either of the points where plaintiff's two said main lnes cross the Arizona-New Mexico boundary, whereby westbound trains of greater lengths than permitted by the Arizona Law could be reduced in length so as to conform to said law, or eastbound trains conforming to the law's limitations consolidated into the larger units permitted by the laws of New Mexico; and no such facilities could be constructed at or adjacent to either or both of said boundary-line points except at great expense.

The inevitable result of the Arizona Law is therefore to control completely train lengths between the boundary line of Arizona and the aforesaid terminals in New Mexico and Texas nearest thereto. But, on account of the transportation service required and furnished for eastbound perishable freight, traffic requirements ordinarily forbid its delay, either while trains are being split up at the first terminal west of or at the Arizona boundary line, or while trains are being consolidated at the first terminal east of Arizona. Consequently, in many instances, eastbound perishable freight trains, originating at southern California points, must be made up into trains not longer than are permitted by the law, at such points of origin; and such short trains must be transported intact as far east as El Paso, Texas, more than 160 miles east of Arizona, at which point, be- [15] cause of the requirements of re-icing and re-classification for diversion pur-

poses, consolidation into larger train units may be effected with a minimum of interference and delay. The locomotive power and crews used to handle eastbound trains, of lengths conforming to the Arizona Law, from their originating points in California to Yuma, and from Lordsburg to El Paso, must be returned to their western termini; and it is therefore necessary either to run short (i. e., Arizona-size) westbound trains from El Paso and from Yuma, or to bring back the locomotives without load and the crews without work, but under pay.

(g) Solely by reason of plaintiff's compliance with said Arizona Train-Limit Law, the average and the maximum lengths of plaintiff's freight trains operated upon its aforesaid main lines across southern California, Arizona and New Mexico have been, now are and will continue to be greatly reduced below the average and maximum lengths which otherwise would obtain; by reason of which compliance with said Train-Limit Law, plaintiff has been compelled and will continue to be compelled to operate a substantially larger number of such trains and therefore to produce, as a result of such operations, a substantially greater number of train miles and locomotive miles for the handling of the same absolute volume of traffic, whether measured in cars handled or in car miles produced. The effect of such compliance with said Train-Limit Law is not and will not be confined to Arizona; for, as aforesaid, said Train-Limit Law operates and

will continue to operate regularly and completely to control the lengths of plaintiff's freight trains, and the number thereof to be operated, not only upon plaintiff's lines in Arizona, but also upon its lines in California at least as far west as Indio, and upon its lines in New Mexico and Texas at least as far east as El Paso, Texas.

Detailed cost studies made by the plaintiff show that the addi- [16] tional financial burden to which it is subjected by reason of the law, upon that portion of its main line which extends from Indio, California, via Yuma, Maricopa, and Lordsburg, to El Paso, amount to more than $300,000.00 each year, which figure relates to freight train operations upon said line only, and does not include any additional expense imposed upon and incurred by reason of the limitation of the law upon the lengths of passenger trains. If it were not for the law, substantial additional savings could also be made by the plaintiff in the operation of its freight trains upon its auxiliary main line through Phoenix, and its auxiliary main line from Tucson via Douglas to El Paso, both of which main lines constitute portions of its through routes from California and Arizona to destinations east thereof; although neither of these routes was included in the above mentioned detailed cost studies made by the plaintiff.

Substantial additional savings, also not included in said cost study or in the above figure of $300,-000.00, would also be made by plaintiff, by running and thus utilizing to the fullest practicable extent

the tractive power of large locomotives, between points outside of Arizona and points in said state; and by shifting such large locomotives between the Arizona lines and similar lines outside of Arizona, in order to take care of peak seasonal business, thereby reducing the aggregate number of locomotives required and increasing the use and efficiency of the locomotives used. From the standpoint of aggregate power, large locomotives cost less in proportion to their tractive effort than do smaller ones; and under standard long-train methods of operation plaintiff's investment in motive power would be reduced because less total tractive power, at a lower cost per unit, would be required to handle the total traffic. Furthermore, under standard long-train operation, substantially less fuel would be required, so that the cost of hauling company fuel would be sub- [17] stantially reduced.

(h) The standard long-train method of operation, heretofore and presently followed by plaintiff, except in Arizona and the adjacent districts where the Arizona Law operates with extraterritorial effect, results in safe, efficient and economical operation, at unit costs which are greatly reduced as compared to those experienced in prior years, and are also less than those incurred in Arizona and the contiguous territory where the Train-Limit Law operates with extraterritorial effect. Solely because of the Arizona law, plaintiff now is and will continue to be subjected to irreparable and continuing

financial burden and expense amounting to at least $300,000.00 per year, being the difference between the expense of the short-train method of operation required by the Arizona Law, and the expense of the standard long-train method of operation heretofore defined, which is presently being followed elsewhere than in Arizona and adjacent territory, and would be adopted and followed in Arizona and said adjacent territory if it were not for the Arizona Law.

(i) The effect of the law is greatly and directly to interfere with and delay plaintiff's interstate freight traffic while in the course of transportation out of, into, across, and within Arizona; and also greatly, directly and unreasonably to delay and interfere with the interstate freight traffic moving on plaintiff's main lines in California and New Mexico; because, as heretofore stated, the trains on those lines, destined to points within or beyond Arizona, must be initially made up, or split up either at the nearest terminals to Arizona or at terminals farther removed, so as to conform to the restrictions of the Arizona statute; and trains moving across Arizona, or from points within that state, destined to points in adjoining states or beyond, must be consolidated, either at the first terminals outside of Arizona [18] or at terminals farther removed, so as to avoid carrying them, with the increased operating and other expenses incident to such short-train operation, until they reach their destinations; and also because the increase in the

number of trains run, inevitably resulting from the operation of the law, causes the number of meetings and passings of the trains, both freight and passenger, incident to the operation of plaintiff's lines of railroad, to be greatly and disproportionately increased, over and above those which would be required if it were not for the law, with resulting delay to each and all of the trains involved in such meetings and passings.

VI.

Effect of the Law Upon Passenger-Train Operations.

(a) The passenger-train provisions of said Train-Limit Law are wholly arbitrary and unreasonable, and without any relation whatsoever to safety, efficiency, or economy of operation, and in fact result in imposing direct and irreparable financial burdens upon the plaintiff, and in increased hazards; moreover, the law has an even greater extraterritorial effect upon a passenger-train than upon freight-train operation. While the financial burden imposed upon passenger-train operation is not as great as that imposed by the law upon freight-train operation, nevertheless it is substantial in amount.

Except in the State of Arizona and in contiguous territory affected by the Arizona Train-Limit Law, passenger trains of more than 14 cars are regularly operated by plaintiff, and by other railroads gen-

erally, whenever and wherever traffic requirements make such operation advisable; and in the aggregate great numbers of such passenger trains are operated. The competition of other forms of transportation makes it imperatively necessary that passenger-train operation be carried on with the [19] utmost economy.

Because of the Arizona Train-Limit Law, many passenger trains of the plaintiff must be initially made up, or, before reaching that state, broken up, so as to comply with the limitations of said law. In order to minimize the effects of said law, and avoid breaking up trains, passenger-train cars are constantly being removed from passenger trains of more than 14 cars, and placed in shorter trains at terminals near Arizona, and at terminals farther removed, whenever and wherever such shifting may be accomplished with a minimum of interruption to traffic.

(b) The limitations fixed by said Train-Limit Law interfere with the movement of passenger-train equipment of all kinds, and particularly with the movement of empty equipment, which, on account of seasonal fluctuations in traffic, must at times be moved in one direction and at other times in the opposite direction. Such equipment could readily be handled on regular passenger trains, without interfering in any way with their ordinary operations, or with the safety or comfort of the passengers or the employes, if it were not for the law.

In addition to the passenger traffic carried on regular trains, which fluctuates greatly from day to day, in many cases special trains for or from Pacific Coast points, or for tours involving movement upon plaintiff's lines across Arizona, are chartered by parties, too large to be accommodated adequately in trains of 14 cars or less, which said parties desire for social or business reasons to travel together. They can travel by plaintiff's Arizona lines only if willing to be subjected to the inconvenience of having a part of the party handled in a second train, or having one or more baggage or other cars not actually occupied by them hauled in some other train, while in Arizona. In consequence, plaintiff is placed at a disadvantage in soliciting and [20] handling such business in competition with other lines running to and from the Pacific Coast, north of Arizona; and the parties who travel via plaintiff's lines are subjected to inconvenience, delay, and interference while on their trips within and/or across Arizona.

Solely as a result of said Train-Limit Law, plaintiff is forced to run numerous extra trains, involving substantial additional expense, not only for the operation of such extra trains themselves, but also in returning the extra crews and extra engines from the destination points of the extra trains to their home terminals, and of sending the extra engines and extra crews from their home terminals to the points where the extra trains originate.

(c) Plaintiff has made no detailed cost-studies for the purpose of determining precisely the additional and unnecessary expense presently resulting from the limitation upon passenger-train lengths contained in said Train-Limit Law, but knows that each year, solely by reason of said law, a substantial number of extra trains are required to be run within and across the State of Arizona, that much equipment is required to be held out and forwarded on following trains, that it is greatly handicapped in the operation of its passenger trains and in the solicitation of its passenger traffic, and that it is subjected to delay and interference both within and outside of Arizona, by reason of the necessity of shifting cars from train to train in connection with the splitting up, in compliance with said law, of the trains destined to points within or beyond Arizona, and the consolidation of trains after leaving Arizona so as to reduce the increased expenses caused by the Arizona Law as soon as practicable; and plaintiff alleges that said expenses are and will continue to be irreparable, substantial, and of constant occurrence, and that they do and will amount to many [21] times $3000.00 each year, in actual out-of-pocket expenditures; that said additional unnecessary expenditures could, and would, be saved and avoided, if plaintiff were relieved of the necessity of complying with said law by a final judgment declaring said law to be invalid and unconstitutional, as herein prayed for.

VII.

The Law Not a Reasonable Safety Measure.

Said Train-Limit Law is arbitrary and unreasonable, and bears no reasonable relation to the health, comfort or safety of persons or the safety of property, and does not operate to promote the health or safety of employees, or passengers, or of the public otherwise. To the contrary, said law creates certain hazards which would not exist, except for the law, and increases other hazards of railroad operation. Said law is wholly unjustified as a supposed regulation by the State of Arizona in the purported interest of the health and safety of persons or property; it takes the plaintiff's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, for the following reasons among others:

(a) Said Train-Limit Law is permissible and sustainable, if at all, only under the reserved police power of the State.

(b) Daily, plaintiff has tendered and delivered to it a large volume of freight, and a large number of passengers, for transportation as a common carrier in interstate commerce and in Arizona intrastate commerce. Its obligation as a common carrier is to receive, transport, and deliver such freight and passengers with all practicable safety, expedition and economy, and to furnish to shippers at receiving points on its lines a supply of empty cars, and to passengers who offer themselves for trans-

portation a supply of accommodations, suitable and [22] adequate for their needs.

Those obligations plaintiff performs to the best of its ability; and in so doing it is necessary for it to operate, and it frequently and as a standard practice does operate, over its lines (except within Arizona and the adjacent territory where the Arizona Law has extraterritorial effect) freight trains of substantially more than 70 cars, exclusive of caboose, and passenger trains of more than 14 cars. Practically all of its freight trains carry interstate freight to a substantial extent; many of them almost entirely. Practically all its passenger trains carry interstate passengers, and mail, baggage, and express moving in interstate commerce. Such long-train methods of operation are not only more economical and more expeditious, as heretofore alleged, but are also substantially safer than the methods of handling freight and passenger traffic, in Arizona and adjacent territory, which are compelled by the terms of the Arizona Law.

(c) On plaintiff's lines in Arizona, as well as on all steam railroads, the frequency of accidents to trains and of resulting casualties to those who are exposed to the hazards of train operation, including employes and members of the public not riding upon such trains, and employes and passengers on passenger trains, is directly related to the number of train units operated; and when more train units are operated than are necessary to handle a given

amount of traffic, all hazards incident to the handling of that traffic are correspondingly increased. As heretofore alleged, the effect of said Train-Limit Law is proximately and directly to cause plaintiff to operate in Arizona and in the adjacent contiguous territory heretofore mentioned many more freight and passenger train units than it would operate if it were relieved of the necessity of compliance with said Train-Limit Law by a final judgment declar- [23] ing said law to be invalid and unconstitutional, and therefore correspondingly to increase the hazards of plaintiff's train operations in Arizona and said affected contiguous territory.

(d) There is no hazard of freight train operation, either generally or as conducted by plaintiff, that can reasonably be said to be related to the number of cars in a freight train, or that can be or is removed or minimized or measurably reduced, by limiting freight trains in Arizona or elsewhere to 70 freight or other cars, exclusive of caboose. There is no hazard of passenger train operation, either generally or as conducted by plaintiff, that can reasonably be said to be related to the number of cars in a passenger train, or that can be or is removed or minimized or measurably reduced, by limiting passenger trains in Arizona or elsewhere to 14 cars.

To the contrary, there are certain distinct and well-known hazards in train operation that are productive of accidents and casualties, and injuries to persons and damage to property, and that are defi-

nitely related to and increase with the number of train units operated, viz.:

(1) head-end and rear-end collisions of trains, with each other and with other vehicles using the same track;

(2) grade-crossing accidents, the hazard of which to a given number of users of a crossing is directly proportional to the number of trains run;

(3) casualties due to additional meets and passings of trains, in connection with which employes must go on top of trains and also leave and board them to open or after closing switches, and for other purposes made necessary by the meet or pass. The number of meets and passings does not vary in proportion to the trains run, but more nearly in proportion to the square of the number of trains run;

(4) accidents in yards, which are related to the number [24] of trains made up or broken up in the yards;

(5) accidents due to defects in or failures of locomotives, the hazard of which ratably increases with the number of locomotives in actual service.

(e) There is, moreover, a large class of hazards in all train operations, which produce accidents and casualties and which are directly related to and increase with the operation of an unnecessary and additional number of trains and the consequent employment and service of a correspondingly additional number of train-men and engine-men to man those additional trains.

More than half of the accidents and casualties that occur in the operation of steam railroads in Arizona and elsewhere are caused by the negligence of, disobedience of rules by, or inadvertence of employes. To require plaintiff to operate more trains than are reasonably necessary to handle the traffic offered to it will inevitably be to increase the hazard to the public, to employes, and to property, by increasing the number of opportunities for individual negligence, disobedience of rules and inadvertence by the employes handling such traffic. Further, by increasing the number of employes necessary to handle a given amount of traffic, the number of individuals who are subject to the hazard of injury in the handling of that traffic is thereby correspondingly increased.

(f) It is not reasonably necessary to limit freight trains to 70 freight or other cars, exclusive of caboose, or passenger trains to 14 cars, in order to prevent or reduce accidents due to defects in or failure of equipment of any class. No accident from these causes has occurred on plaintiff's freight trains of more than 70 cars in length, exclusive of caboose, or on plaintiff's passenger trains of more than 14 cars, of which it can reasonably be said that the same accident would not, or probably would not, have occurred if the train had been of [25] the length permitted by the Arizona Law, or even substantially shorter. Defects in and failures of locomotives are solely related to the individual locomotive; and defects in and failures of cars are re-

lated to the number of cars run, and not to the trains into which they are divided.

(g) There is no reason or basis for any claim that for reasons of safety or for any other reasons freight trains in Arizona should be limited to 70 freight or other cars, exclusive of caboose, or passenger trains to 14 cars; the Arizona Train-Limit Law does not and will not only not decrease whatever general or special hazard there is existent and inherent in plaintiff's freight and passenger train operations in Arizona, but does and will, to the contrary, materially impair and substantially lessen the safety of plaintiff's freight and passenger train operations in Arizona, by creating certain individual hazards which would not otherwise exist, and by increasing other hazards inherent in train operation as hereinbefore described.

VIII.

The Traffic Across Arizona Preponderantly Interstate.

Substantially all of the freight and passenger traffic transported on plaintiff's main lines across the State of Arizona consists of interstate traffic, by far the greater part of which either originates in the State of California and is destined to points east of the Rocky Mountains, or originates at points east of the Rocky Mountains and is destined to California points, and is commonly known as transcontinental traffic. A large part of the remainder of

such interstate traffic consists of traffic moving to or from the State of Arizona.

A substantial portion of the traffic originating in California [26] as well as in Arizona, and destined to points east of Arizona consists of perishable freight (i. e., fruits and vegetables) which are required to be transported in as large train units as practicable, so as not to delay their receipt in eastern markets, where prices constantly fluctuate, and so as to prevent loss of value by decay and deterioration.

The traffic handled upon plaintiff's lines extending across the States of Nevada and Utah likewise consists almost entirely of interstate traffic, and principally of transcontinental traffic as above defined; and in large part of perishable products, moving from the States of California and Oregon to eastern destinations, and of traffic moving to the Pacific Coast states; and in many respects is thus closely similar to the traffic carried upon plaintiff's lines across the State of Arizona.

The Arizona Train-Limit Law, by preventing the proper and expeditious handling of the aforesaid interstate traffic from, to and across the State of Arizona, by limiting the lengths of the train units in which it may be handled, thereby unnecessarily and unreasonably burdens, delays, and interferes with the interstate commerce in which it moves.

The traffic on the interstate passenger trains operated by plaintiff upon its lines across the State

of Arizona consists, almost in its entirety, of passengers, baggage, and express moving from one state to another; moreover, practically all of said interstate passenger trains carry United States mail. The inevitable effect of said Arizona Law is frequently to delay such interstate passenger trains, as they enter or are about to enter, or are leaving or about to leave, or are in transit across the State of Arizona, and thereby unreasonably and unnecessarily to burden, delay, and interfere with the interstate commerce carried on by means of said trains. [27]

IX.

The Subject of Train Limitation One of National Concern.

The permissible number of cars in an interstate train is a subject of national, and not local, concern, and one which, if any regulation at all is to be required, should be regulated by the Federal Government and not by the individual states, in that it is wholly impracticable to move railroad terminals to state lines, or to split or consolidate through trains except at terminals; and at some terminals freight trains containing perishable freight cannot be delayed for purposes of splitting up or consolidation. If other states should regulate train lengths in accordance with their several notions as to what would be proper within their respective boundaries, all such regulations necessarily would have wide extraterritorial effect, as

does the Arizona Law, and to comply with their conflicting provisions would seriously embarrass through interstate train operations.

X.

The Law Impairs the Usefulness of Plaintiff's Facilities.

The necessary effect and operation of said Train-Limit Law is directly, substantially, and continuously to impair the use and usefulness of the facilities used and usable by the plaintiff, in the carriage of interstate commerce across, into, through, and out of, the State of Arizona.

XI.

The Law Imposes Direct Burdens Upon Interstate Commerce.

The additional and unnecessary expense of interstate freight train and interstate passenger train operation, more fully set [28] forth heretofore, to which plaintiff is subjected as hereinbefore alleged, and which plaintiff could avoid if it were not for said Train-Limit Law, is a substantial and direct burden upon the interstate commerce carried on by plaintiff into, out of, across and through the State of Arizona by means of its said interstate trains.

XII.

The Law Violates the Commerce Clause of the Federal Constitution.

Said Train-Limit Law is unconstitutional and void, as to each and all of the interstate trains of the plaintiff, in that it conflicts with and violates the Commerce Clause (Paragraph 3 of Section 8, Article I) of the Constitution of the United States; because:

(a) The permissible number of cars in an interstate railroad train passing from one state to another, or passing from one state through another into a third, or passing through a number of states, is a subject over which exclusive legislative jurisdiction was and is vested in Congress by said Commerce Clause;

(b) The necessary effect of said law is: (1) to impose a direct and substantial burden upon, and directly and substantially to interfere with, delay, and regulate, the operation of plaintiff's interstate freight and passenger trains across and within Arizona, as well as in California and New Mexico; (2) to determine the number of interstate trains to be run by plaintiff, not only within Arizona, but also within adjoining portions of California and New Mexico; and (3) to impair the usefulness of the facilities used as well as those usable by the plaintiff in the carriage of interstate commerce across, through, into, and out of, the State of Arizona. [29]

XIII.

The Law Violates the Due-Process Clause of the XIV Amendment.

Said Train-Limit Law is further unconstitutional and void, and in violation of the aforesaid Commerce Clause of the Constitution, and also operates unreasonably and arbitrarily to deprive plaintiff of its property without due process of law, in violation of the Due-Process Clause of the Fourteenth Amendment to the Constitution of the United States, because:

(a) It fixes maximum train lengths very much lower than those which generally obtain elsewhere throughout the United States, under operating conditions substantially the same as those on plaintiff's main lines in Arizona;

(b) It makes no allowance for grade or other operating conditions, or for the construction, type, weight, or length of the cars composing the train, or whether such trains are loaded or empty, and if loaded the weight of the load;

(c) It imposes a great and substantial burden of expense upon, interference with, and delay to, interstate commerce and impairs the usefulness of plaintiff's transportation facilities; and

(d) It bears no reasonable relation to health or safety.

XIV.

The Law in Conflict with Federal Legislation.

Said Train-Limit Law is further void, invalid, and unenforceable, for the reason that it is in conflict with, and/or an infringement upon, legislation heretofore enacted by Congress, pursuant to its powers under the Commerce Clause of the Constitution, in the following respects:

(a) To the extent that said Train-Limit Law is or may be intended to prevent the use of heavy locomotives in the State of [30] Arizona, and thus to regulate locomotive sizes, it is an infringement upon and in conflict with statutes enacted by Congress pursuant thereto, having the same or a like purpose, to wit, the Boiler Inspection Act of February 17, 1911 (36 Stat. 913), as amended in 1915, (38 Stat. 1192) and in 1924 (43 Stat. 659), being Sections 23 to 35, inclusive, of Title 45 of the United States Code, wherein and whereby full power over the size, design, weight or construction of locomotives was delegated to and is now vested in the Interstate Commerce Commission;

(b) To the extent to which said Train-Limit Law is intended to or has or may have the effect of limiting the number of cars in a freight or passenger train to the maximum number which properly and with reasonable safety can be controlled in one train by the type of air brakes and their appurtenances now used on such trains, or by any other form of train-control devices or other safety devices,

it is void, in that it attempts to and does enter a legislative field already entered and therefore completely occupied by Congress: the Congress having, under the Commerce Clause, by the enactment of the power-brake provisions of the Safety Appliance Act, as amended (Sections 1 and 9 of Chapter 1 of Title 45 of the United States Code), and the provisions of Section 26 of the Interstate Commerce Act (Section 26 of Chapter 1 of Title 49, of the United States Code), delegated to the Interstate Commerce Commission full and complete authority to investigate and determine the adequacy of the air-brakes, and their appurtenances, and other forms of train-control and other safety devices, used or proposed to be used upon locomotives and cars operated in interstate commerce, and by order to prescribe the form and type of such air-brakes, appurtenances and other train-control and safety devices, and from time to time to issue such amendatory and supplementary orders as it may deem necessary or desirable in the exercise of the power and jurisdic- [31] tion thus conferred by Congress; and the Congress having, in particular, in and by said statutes, necessarily empowered said Interstate Commerce Commission to determine whether the types of air-brakes, and their appurtenances, presently used or proposed to be used upon trains in interstate commerce, are or will be adequate and effective, safely and properly to control and to stop trains of the lengths now being operated in inter-

state commerce, both in the State of Arizona and elsewhere, by the plaintiff and by other railroad common carriers throughout the United States.

XV.

Nature of the Controversy.

An actual controversy has arisen and now exists, with respect to the validity and constitutionality of said Arizona Train-Limit law, and the rights, duties, powers and obligations of the parties to this suit under said law; in that plaintiff, on the one hand, as heretofore set forth at length, claims and maintains that said train-limit law is wholly void, unconstitutional and unenforceable, in so far as it applies or may apply to any of the plaintiff's railroad operations within or without Arizona; whereas defendant, on the other hand, claims and maintains that said train-limit law is valid and constitutional in all respects and is applicable to and binding upon plaintiff in its ralroad operations in Arizona; and said defendant further claims and maintains that, in the event of violation of said law by plaintiff, it is and will be his duty forthwith to institute or direct the institution of proceedings to recover from plaintiff the penalties provided in said law and otherwise to enforce compliance therewith by plaintiff.

If it were not for said law, and the position and opinion with regard to the constitutionality and validity thereof maintained by defendant, as afore-

said, plaintiff could and would at once begin and hereafter continue to operate a substantial number of its [32] freight, and passenger trains into, within, through and across Arizona, without regard to the restrictions and limitations imposed by said law; and would thereby and thereupon at once begin and thereafter continue to effect the increased economy and efficiency and the greater safety of operation which, as heretofore set forth in detail, are and would be attendant upon and caused by such long-train operation.

Plaintiff is presently unwilling and unable to undertake such long-train operations within, through and across Arizona, in the absence of a final determination and declaration that said law is invalid and unconstitutional as applied to its operations, because of the heavy cumulative penalties which, as hereinafter described, would shortly accrue if such a course were followed, and the law should be sustained in prosecutions instituted by or at the direction of defendant for the purpose of enforcing said law and recovering the penalties therein provided.

By reason of the aforesaid conflicting claims of the plaintiff and defendant, and the actual controversy thereby created and now existing, it is necessary that this Court render its declaratory judgment and decree, adjudging and determining whether said law be constitutional and valid, and adjudging and determining the rights, powers,

duties and obligations of each of the parties hereto under said law, and thereby finally adjudging and determining the aforesaid controversy.

XVI.

Extent and Cumulative Character of Penalties for Violation of Train-Limit Law.

In handling the interstate freight traffic moving over its lines across the State of Arizona, plaintiff operates daily in each direction between its freight terminals at Yuma, Arizona, and Gila, Arizona, and between its freight terminals at Gila and Tucson, [33] Arizona, and between its freight terminals at Tucson and Lordsburg, New Mexico, a substantial number of through interstate freight trains, all of which move over the line heretofore described as the Yuma-Maricopa-Lordsburg Line. The number of such trains so operated each day varies according to the demands of traffic and ranges from approximately 75 trains per month on the average, in each direction between Yuma and Gila, and 75 trains per month in each direction between Gila and Tucson, and 90 trains per month in each direction between Tucson and Lordsburg, during the month of November, to 180 trains per month in each direction between Yuma and Gila, and 180 trains per month in each direction between Gila and Tucson, and 200 trains per month in each direction between Tucson and Lordsburg, during the month of June; which said months of November and June repre-

sent the months during the year when such interstate traffic across Arizona is lightest and heaviest, respectively.

If plaintiff were to disregard the provisions of the Arizona Train-Limit Law, and were to attempt to operate each of its aforesaid freight trains within or across the State of Arizona with more than 70 cars each, exclusive of caboose, it would thereby become subject to prosecution for the recovery of the severe penalties provided by Section 3 of said Train-Limit Law, which said Section provides a penalty of not less than $100.00 nor more than $1,000.00 for each such violation. As heretofore alleged, said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said Act which it may commit. Plaintiff would thus become liable for penalties, in the event the defendant should institute such prosecutions, as directed and required by said Section 3, which, in the event said law should be sustained in said prosecutions, would range, on the average, from $1,600.00 to $16,000.00 per day, during the period of lightest [34] traffic, and from $3,700.00 to $37,000.00 per day during the period of heaviest traffic; and said penalties would be and will be cumulative, and may or might be recovered by said defendant, in a single prosecution or in a series of prosecutions instituted for that purpose, unless said law be declared invalid and unconstitutional by final judgment as herein prayed for. Said penalties would be addi-

tional to any penalties which might be incurred by the operation of freight trains of more than 70 cars, exclusive of caboose, upon the Wellton-Phoenix-Picacho or Tucson-Douglas main lines, hertofore described, or upon any of the branch lines in Arizona, or of passenger trains of more than 14 cars upon any part of the plaintiff's lines in Arizona.

If, on the other hand, plaintiff should continue to comply with said law, and should continue to operate all of its freight trains upon its lines within the State of Arizona, and the adjacent districts in which the law now has extraterritorial effect, with not more than 70 freight or other cars, exclusive of caboose, and were to continue to operate all of its passenger trains within Arizona and said adjacent districts with not more than 14 cars each, the added expense thus imposed upon plaintiff, solely as the result of said compliance, would be and will continue to be, as heretofore more fully alleged, not less than $300,000 per year, or, on the average, not less than approximately $822.00 per day, all of which such added expense is and will be continuous and irreparable.

XVII.

Lack of Adequate Remedy at Law.

Plaintiff, as a citizen and resident of the State of Kentucky, has no plain, speedy or adequate remedy at law in this or any other court of the United States of America.

Plaintiff, irrespective of its residence and citizenship in a state other than the State of Arizona, has no plain, speedy or adequate [35] remedy at law in any court of the State of Arizona, or in any other jurisdiction.

Prayer for Relief.

Wherefore, inasmuch as it is without any adequate remedy at law for its protection, plaintiff prays:

(1) That after due hearing held in accordance with law this Court do declare, adjudge and decree the rights, powers, duties and obligations of the plaintiff and the defendant with respect to the aforesaid Arizona Train-Limit Law, and with respect to the controversy which has arisen and now exists as between the plaintiff and the defendant regarding the validity, constitutionality and enforceability of said train-limit law; and that in particular this Court do declare, adjudge and decree:

(a) That plaintiff has no plain, speedy or adequate remedy at law for the damage and injury which result from its enforced compliance with said Arizona Train-Limit Law, and that such damage and injury are and will continue to be great and irreparable, unless plaintiff be relieved, by final judgment declaring said law to be invalid and unconstitutional as to the plaintiff, from the necessity of continuing to comply with said law;

(b) That said Arizona Train-Limit Law is arbitrary and unreasonable in and of itself, is void and

in violation of the provisions and prohibitions of the Constitution of the United States hereinbefore specified, and infringes upon and violates the several acts of Congress hereinbefore enumerated, and is *therefor* wholly invalid and unenforceable as to the plaintiff or any of the plaintiff's operations within the State of Arizona;

(2) That the plaintiff have such other and further or different relief as may be equitable and proper in the premises and as to the Court may seem meet.

Plaintiff further prays to the Court to grant not only a declara- [36] tory judgment and decree conformable to the prayer of this complaint, but also that a summons of the United States of America issue out of and under the seal of this Honorable Court directed to the defendant Joe Conway, commanding him on a day certain therein named to be and appear before this Court then and there to answer, but not under oath (answer under oath being hereby expressly waived), all and singular the premises, and to abide by such judgment and decree as may be made herein.

SOUTHERN PACIFIC
COMPANY,
By J. H. DYER,
Vice-President (in Charge of
Operations).
ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff.

Attest:
R. G. HILLEBRAND,
Assistant Secretary
(Corporate Seal of Southern Pacific Company)

C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
Of Counsel. [37]

Verification.

State of California,
City and County of San Francisco—ss.

J. H. Dyer, being first duly sworn, deposes and says:

That he is an officer, to wit, Vice President in charge of operations, of Southern Pacific Company, the corporation named as plaintiff in the foregoing complaint; that as such officer he makes this verification for and on behalf of said corporation;

That he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge, except as the matters therein stated on information and belief, and as to such matters he believes it to be true.

J. H. DYER.

Subscribed and sworn to before me this 15th day of April, 1939.

[Notarial Seal] FRANK HARVEY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr 18, 1939. [38]

[Title of District Court and Cause.]

MOTION TO DISMISS

Now comes the defendant, Joe Conway, and moves to dismiss the Complaint filed in the above entitled cause for the following reasons:

I.

It appears upon the face of the Complaint that there is a lack of jurisdiction over the subject matter.

II.

The Complaint fails to state a claim upon which relief can be granted.

III.

The Complaint reveals no "actual controversy" between the parties as required by the Federal Declaratory Judgment Act of 1934 (28 U. S. Code, Section 400).

Respectfully submitted,
CHARLES L. STROUSS
W. E. POLLEY
Attorneys for Defendant
703 Heard Building
Phoenix, Arizona

[Endorsed]: Filed May 5, 1939. [39]

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

State of Arizona
County of Maricopa—ss.

Joe Conway, being first duly sworn upon oath, deposes and says: That he is the same Joe Conway who is named as defendant in the above entitled cause; that no actual controversy, or any controversy whatsoever, has arisen or exists between the plaintiff and the defendant with respect to the validity or constitutionality of the Arizona Train-Limit Law, or with respect to the rights, duties, powers or obligations of the parties to this suit under said law; that he does not claim or maintain, and has not claimed or maintained, that said Arizona Train-Limit Law is valid or constitutional in all respects, or in any respects, or is applicable to or is binding upon plaintiff in its railroad operations in Arizona, or that in the event of violation of said law by plaintiff it is or will be affiant's duty to institute or to direct the institution of proceedings to recover from the plaintiff the penalties provided in said law or otherwise to enforce compliance therewith by plaintiff. In this connection affiant says that in his individual capacity, the capacity in which he is here sued, the affiant has no duty or authority in connection therewith, and has no interest whatsoever in the determination of the

validity or constitutionality of said Arizona Train-Limit Law; that if said [40] Arizona Train-Limit Law is unconstitutional, as plaintiff contends, affiant in his official capacity as Attorney General of the State of Arizona has no duty or authority to enforce said Arizona Train-Limit Law and has no duty to perform in connection with said law; that the formulating of an opinion by the affiant concerning the validity or constitutionality of the said Arizona Train-Limit Law and of the duty of the affiant in his official capacity in connection therewith and in the enforcement thereof requires and will require a great amount of study and investigation into facts, information and data in connection therewith; that affiant is informed and believes and on information and belief alleges that in a proceeding in this Court (Southern Pacific Company vs. K. Berry Peterson, Attorney General of the State of Arizona, Equity No. 196, Phx.), wherein the validity or constitutionality of said Arizona Train-Limit Law was in issue but not determined, approximately 25 volumes of evidence material and relevant to facts bearing upon the question of the validity or constitutionality of said Arizona Train-Limit Law were received, in addition to numerous intricate and involved exhibits; that affiant, either in his individual or official capacity, has made no study or investigation, and has no knowledge or information concerning, the facts, data or information relevant or material to, or bearing upon the question of the validity or constitutionality of said

Arizona Train-Limit Law, and has formulated no opinion or belief, and makes no contention, either as to the validity, constitutionality or unconstitutionality of said Arizona Train-Limit Law, or as to affiant's duties thereunder, or as to the application of said Arizona Train-Limit Law to plaintiff's railroad operations in Arizona; that no occasion has arisen for affiant to investigate the constitutionality of said Arizona Train Limit Law because there has been no report or information furnished to affiant of any violation of said Arizona Train-Limit Law in Arizona, and affiant has no [41] knowledge or information that said law ever has been violated.

Further affiant sayeth not.

JOE CONWAY

Subscribed and sworn to before me, a Notary Public, this 5th day of May, 1939.

[Seal] GLADYS L. ARMSTRONG
Notary Public

My Commission Expires July 16, 1941.

[Endorsed]: Filed May 5, 1939.

[Endorsed]: Pltfs. Exhibit No. 1. Admitted and Filed Dec. 12, 1939. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Wm. H. Loveless, Chief Deputy Clerk. Case No. Civ-31 Phx. S. P. Co. vs. Joe Conway. [42]

[Title of District Court and Cause.]

PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S AFFIDAVIT FILED "IN SUPPORT OF MOTION TO DISMISS."

Now comes the above-named plaintiff, and moves the Court to strike from the files in the above-entitled cause the affidavit of the defendant Joe Conway heretofore filed in this cause on or about the 5th day of May, 1939, which said affidavit is styled "Affidavit in Support of Motion to Dismiss"; and in support of said motion assigns the following grounds:

(1) Said affidavit is wholly irrelevant and immaterial to any issue or issues raised or presented by the defendant's said motion to dismiss the complaint on file herein.

(2) Said affidavit is impertinent, in that the same is not relied upon, or in any manner referred to, in the defendant's aforesaid motion to dismiss.

(3) Said affidavit is sham and insincere.

(4) There is no authority for the filing or consideration of said affidavit. [43]

This motion is made pursuant to the provisions of Rule 12(f) of the Rules of Civil Procedure of the District Courts of the United States.

Respectfully,

ALEXANDER B. BAKER
LOUIS B. WHITNEY
703 Luhrs Tower, Phoenix, Arizona.
Solicitors for Plaintiff.

C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
65 Market Street,
San Francisco, California.
Of Counsel.

[Endorsed]: Filed May 15, 1939. [44]

[Title of District Court.]

April 1939 Term At Phoenix

MINUTE ENTRY OF MAY 22, 1939
(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, Presiding.

[Title of Cause.]

Defendant's Motion to Dismiss and Plaintiff's Motion to strike Affidavit in Support of Motion to Dismiss come on regularly for hearing this day.

Messrs. Baker and Whitney appear as counsel for the plaintiff. Charles L. Strouss, Esquire, and W. E. Polley, Esquire, appear as counsel for the defendant.

On motion of Alexander Baker, Esquire,

It Is Ordered that Burton Mason, Esquire, be entered as associate counsel for the plaintiff.

Argument is now had by respective counsel, and

It Is Ordered that said Motion to Dismiss and said Motion to Strike Affidavit in Support of Mo-

tion to Dismiss be submitted and by the Court taken under advisement. [45]

[Title of District Court.]

April 1939 Term At Phoenix

MINUTE ENTRY OF JUNE 24, 1939
(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, Presiding.

[Title of Cause.]

Defendant's Motion to Dismiss and Plaintiff's Motion to Strike Affidavit having been argued, submitted and by the Court taken under advisement, and the Court having duly considered the same and being fully advised in the premises,

It Is Ordered that said Motion to Dismiss be and it is denied, and that said Motion to Strike Affidavit be and it is denied. [46]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, Joe Conway, and answering the plaintiff's complaint herein admits, denies and alleges as follows:

I.

There is a want of jurisdiction in that no case or controversy is presented within the judicial power of the United States.

II.

There is a want of jurisdiction in that the suit is one against the State of Arizona by a citizen of another State in Violation and in contravention of the Eleventh Amendment to the Constitution of the United States.

III.

Defendant admits the allegations contained in subsection (a) of paragraph I of plaintiff's complaint.

IV.

Answering subsection (b) of paragraph I of plaintiff's complaint defendant admits he is sued as an individual and not in his official capacity; admits that he is a citizen of the State of Arizona residing in the City of Phoenix, County of Maricopa, in said state, and is the duly elected, qualified and acting Attorney General of the State of Arizona; defendant denies that under the Constitution or laws of the State of Arizona power or authority is vested in, or the duty is imposed upon, defendant in his individual [47] capacity to commence or prosecute, or to direct the institution or prosecution of suits for penalties for a violation of the Arizona Train-Limit Law; and in this connection defendant alleges that only if said Arizona Train-Limit Law is con-

stitutional is any power or duty imposed upon the defendant in his official capacity to commence or prosecute, or to direct the institution or prosecution of, suits for penalties for any violation of the said Arizona Train-Limit Law; and that if, as plaintiff alleges and contends, said Arizona Train-Limit Law is unconstitutional, then neither under the Constitution nor the laws of the State of Arizona is any power vested in, nor any duty imposed upon the defendant in his official capacity to commence or prosecute, or to direct the institution or prosecution of, suits for penalties for a violation of said Arizona Train-Limit Law, or in any manner whatsoever to enforce said Arizona Train-Limit Law; in this connection defendant further alleges that the formulating of an opinion by the defendant concerning the validity or constitutionality of the said Arizona Train-Limit Law and of the duty of the defendant in his official capacity in connection therewith and in the enforcement thereof requires and will require a great amount of study and investigation into facts, information and data in connection therewith; that defendant is informed and believes and on information and belief alleges that in a proceeding in this Court (Southern Pacific Company vs. K. Berry Peterson, Attorney General of the State of Arizona, Equity No. 196, Phx.), wherein the validity or constitutionality of said Arizona Train-Limit Law was in issue but not determined, approximately twenty-five volumes of evidence material and relevant to facts bearing upon

the question of the validity or constitutionality of said Arizona Train-Limit Law were received, in addition to numerous intricate and involved exhibits; that defendant, either in his individual or official capacity, has made no study or investigation, and has no knowledge or information concerning, the [48] facts, data or information relevant or material to, or bearing upon the question of the validity or constitutionality of said Arizona Train-Limit Law, and has formulated no opinion or belief, and makes no contention, either as to the validity, constitutionality or unconstitutionality of said Arizona Train-Limit Law, or as to defendant's duties thereunder, or as to the application of said Arizona Train-Limit Law to plaintiff's railroad operations in Arizona; that no occasion has arisen for defendant in his official capacity to investgate the constitutionality of said Arizona Train-Limit Law because there has been no report or information furnished to defendant of any violation of said Arizona Train-Limit Law in Arizona, and defendant has no knowledge or information that said law ever has been violated, and in his individual capacity defendant has no interest whatsoever in the investigation or determination of the constitutionality or unconstitutionality of the Arizona Train-Limit Law.

V.

Defendant denies each and every, all and singular, the allegations contained in subsection (a) of paragraph II of plaintiff's complaint.

VI.

Answering subsection (b) of paragraph II of plaintiff's complaint defendant denies that there is any matter whatsoever in controversy between the plaintiff and the defendant and denies that any controversy exists between plaintiff and defendant.

VII.

Answering subsection (c) of paragraph II of plaintiff's complaint defendant denies that this suit arises under the Constitution or laws of the United States for the reason that defendant makes no contention either as to the constitutionality or unconstitutionality of the Arizona Train-Limit Law and no controversy exists between plaintiff and defendant within the judicial power [49] of the United States Courts.

VIII.

Answering subsection (d) of paragraph II of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said subsection (d); that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said subsection (d), or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters

and things alleged in said subsection (d), or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said subsection (d); that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said subsection (d).

IX.

Answering subsection (e) of paragraph II of plaintiff's complaint defendant denies that facts or circumstances set forth in plaintiff's complaint necessitate or justify the exercise of the jurisdiction of this Court herein; denies that this Court has jurisdiction herein for the reason that no controversy has arisen or exists between plaintiff and defendant within the judicial power of United States courts.

X.

Answering paragraph III of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph III; that he is without funds, except his individual and personal funds, with which to investigate, procure or present [50] evidence concerning the matters alleged in said paragraph III, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity,

the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph III, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph III; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph III.

XI.

Defendant admits the allegations contained in paragraph IV of plaintiff's complaint.

XII.

Answering paragraph V of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph V; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph V, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph V, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in

said paragraph V; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph V.

[51]

XIII.

Answering paragraph VI of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph VI; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph VI, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph VI, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph VI; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph VI.

XIV.

Answering paragraph VII of plaintiff's complaint defendant alleges that he has no knowledge

or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph VII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph VII, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph VII, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph VII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to [52] taking evidence thereon, defendant admits the allegations of said paragraph VII.

XV.

Answering paragraph VIII of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph VIII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph VIII, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon;

that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph VIII, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph VIII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph VIII.

XVI.

Answering paragraph IX of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph IX; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph IX, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph IX, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or [53] things presented in said paragraph IX; that for such reasons and to avoid and prevent a judgment against de-

fendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph IX.

XVII.

Answering paragraph X of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph X; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph X, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph X, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph X; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph X.

XVIII.

Answering paragraph XI of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XI; that he is without funds, except his individual and personal funds, with which to investi-

gate, procure or present evidence concerning the matters alleged in said paragraph XI, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said [54] paragraph XI, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XI; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XI.

XIX.

Answering paragraph XII of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XII, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XII, or in procuring or presenting evidence in respect thereto, or in the

adjudication or determination of the matters or things presented in said paragraph XII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XII.

XX.

Answering paragraph XIII of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XIII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XIII, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capa- [55] city, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XIII, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XIII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XIII.

XXI.

Answering paragraph XIV of plaintiff's complaint defendant alleges that he has no knowledge

or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XIV; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XIV, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XIV, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XIV; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XIV.

XXII.

Answering paragraph XV of plaintiff's complaint defendant denies that an actual controversy, or any controversy, has arisen or exists between the plaintiff and the defendant with respect to the validity or constitutionality of the Arizona Train-Limit Law, or with respect to the rights, duties, powers or obligations of the parties to this suit under said law, or at all; denies that [56] defendant claims or maintains that said Arizona Train-Limit Law is valid or constitutional in all respects,

or in any respect, or is applicable to or binding upon plaintiff in its railroad operations in Arizona; denies that defendant claims or maintains that, in the event of violation of said law by plaintiff, it is or will be his duty to institute or to direct the institution of proceedings to recover from plaintiff the penalties provided in said law or otherwise to enforce compliance therewith by plaintiff.

In this connection defendant alleges that in his individual capacity, the capacity in which he is here sued, the defendant has no duty whatsoever to enforce said law or to perform in connection therewith, and has no interest whatsoever in the determination of the validity or constitutionality of said Arizona Train-Limit Law; and that if, as plaintiff alleges and contends, said Arizona Train-Limit Law is unconstitutional, then neither under the Constitution nor the laws of the State of Arizona is any power vested in, nor any duty imposed upon the defendant in his official capacity to commence or prosecute, or to direct the institution or prosecution of, suits for penalties for a violation of said Arizona Train-Limit Law, or in any manner whatsoever to enforce said Arizona Train-Limit Law; in this connection defendant further alleges that the formulating of an opinion by the defendant concerning the validity or constitutionality of the said Arizona Train-Limit Law and of the duty of the defendant in his official capacity in connection therewith and in the enforcement thereof requires and will require a great amount of study and inves-

tigation into facts, information and data in connection therewith; that defendant is informed and believes and on information and belief alleges that in a proceeding in this Court (Southern Pacific Company vs. K. Berry Peterson, Attorney General of the State of Arizona, Equity No. 196, Phx.), wherein the validity or constitutionality of said Arizona Train-Limit Law was in issue but not determined, approxi- [57] mately twenty-five volumes of evidence material and relevant to facts bearing upon the question of the validity or constitutionality of said Arizona Train-Limit Law were received, in addition to numerous intricate and involved exhibits; that defendant, either in his individual or official capacity, has made no study or investigation, and has no knowledge or information concerning, the facts, data or information relevant or material to, or bearing upon the question of the validity or constitutionality of said Arizona Train-Limit Law, and has formulated no opinion or belief, and makes no contention, either as to the validity, constitutionality or unconstitutionality of said Arizona Train-Limit Law, or as to defendant's duties thereunder, or as to the application of said Arizona Train-Limit Law to plaintiff's railroad operations in Arizona; that no occasion has arisen for defendant in his official capacity to investigate the constitutionality of said Arizona Train-Limit Law because there has been no report or information furnished to defendant of any violation of said Arizona Train-Limit Law in Arizona, and defendant has no knowl-

edge or information that said law ever has been violated, and in his individual capacity defendant has no interest whatsoever in the investigation or determination of the constitutionality or unconstitutionality of the Arizona Train-Limit Law; defendant denies that the position or opinion of the defendant with regard to the constitutionality or validity of said Arizona Train-Limit Law in any way interferes with the plaintiff's operations; denies that defendant has or maintains any position, opinion or contention concerning the validity or constitutionality of said Arizona Train-Limit Law; denies that any conflicting claim exists between the plaintiff and the defendant concerning the validity or constitutionality of said Arizona Train-Limit Law; denies that any controversy, actual or otherwise, exists between the plaintiff and the defendant; denies that it is necessary, proper, or within the jurisdiction of the Court to render a declaratory judgment, or any [58] judgment herein.

XXIII.

Defendant denies that he claims or maintains that it is or will be his duty, as Attorney General or otherwise, to prosecute or sue plaintiff for each or for any violation by plaintiff of the Arizona Train-Limit Law as alleged in paragraph XVI of plaintiff's complaint.

Answering, each and every, all and singular, the allegations contained in paragraph XVI not herein specifically admitted or denied defendant alleges

that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XVI; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XVI, or to pay any costs which might be incurred, and adjudged against him, in taking evidence thereon; that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XVI, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XVI; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XVI.

XXIV.

Answering paragraph XVII of plaintiff's complaint defendant alleges that he has no knowledge or information sufficient to form a belief concerning the truth or falsity of the matters alleged in said paragraph XVII; that he is without funds, except his individual and personal funds, with which to investigate, procure or present evidence concerning the matters alleged in said paragraph XVII, or to pay any costs which might be incurred, and [59] adjudged against him, in taking evidence thereon;

that defendant in his individual capacity, the capacity in which he is here sued, has no interest whatsoever in investigating the matters and things alleged in said paragraph XVII, or in procuring or presenting evidence in respect thereto, or in the adjudication or determination of the matters or things presented in said paragraph XVII; that for such reasons and to avoid and prevent a judgment against defendant for costs necessary to taking evidence thereon, defendant admits the allegations of said paragraph XVII.

Wherefore, defendant prays that plaintiff's complaint and action be dismissed for want of jurisdiction and that defendant have his costs herein expended.

CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant,
703 Heard Building,
Phoenix, Arizona.

[Endorsed]: Filed Jul. 5, 1939. [60]

[Title of District Court.]

April 1939 Term
at Phoenix

MINUTE ENTRY OF SEPTEMBER 18, 1939

(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

Plaintiff's Motion for Order Appointing Special Master and Referring Cause to such Special Master and Defendant's Objection to Appointment of Special Master come on regularly for hearing this day.

Louis Whitney, Esquire, and Burton Mason, Esquire, appear as counsel for the plaintiff. Charles L. Strouss, Esquire, appears as counsel for the defendant.

Argument is now had by respective counsel, and

It is ordered that said Motion for Order Appointing Special Master and Referring Cause to such Special Master be and it is denied. [61]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF OCTOBER 23, 1939

(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

It is ordered that this case be set for pre-trial conference Friday, November 3, 1939, at ten o'clock a. m., pursuant to Rule 16, and it is further ordered that this case be set for trial Tuesday, December 12, 1939, at ten o'clock a. m. [62]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF NOVEMBER 3, 1939

(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

This case comes on regularly this day for pre-trial conference pursuant to Civil Rule 16.

Henley C. Booth, Esquire, Burton Mason, Esquire, Alexander B. Baker, Esquire, and Louis B. Whitney, Esquire, appear as counsel for the plain-

tiff. The defendant, Joe Conway, is present with his counsel, Charles L. Strouss, Esquire, and W. E. Polley, Esquire.

Louis L. Billar is now duly sworn to report these proceedings and pre-trial hearing is now had. [63]

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE

The Pre-Trial Conference was called on the above entitled cause by the Honorable Dave W. Ling, Judge of the United States District Court for the District of Arizona, commencing at the hour of 10 o'clock A. M. on the 3rd day of November, 1939.

The plaintiff was represented by Messrs. Alexander B. Baker and Louis B. Whitney, 703 Luhrs Tower, Phoenix, Arizona, Solicitors, and Messrs. C. W. Durbrow, Henley C. Booth and Burton Mason, 65 Market Street, San Francisco, California, of Counsel.

The defendant was represented by Messrs. Charles L. Strouss and W. E. Polley, 703 Heard Building, Phoenix, Arizona.

Thereupon the following proceedings were had:

Thereupon Louis L. Billar was duly sworn to act as official Shorthand Reporter during the proceedings. [64]

The Court: I think probably we could save some time in the trial of this case if we could learn now on the issues which are to be presented what por-

tions of the complaint are denied and which are admitted. There seems to be some question in the minds of counsel for the plaintiff whether the defendant's answer would constitute an admission or a denial of some of the allegations in the complaint. I think we might clear that up.

I notice in Paragraph 1 of the complaint, that seems to be admitted except down to line 15 on page 2.

Mr. Mason: Your Honor please, I have prepared a summary of the allegations which may save a little time in your review. I would like to present it to you and present a copy to opposing counsel. It is entitled "Plaintiff's Memorandum for Pre-Trial Conference" and, Mr. Reporter, will you show that I have handed a copy to his Honor and also a copy to Mr. Strouss.

(Thereupon a copy of document was presented to the court and to counsel, Mr. Strouss, by Mr. Mason.)

The Court: Well, I gather from this that the allegations of the complaint, then, are 3, 5, 6, 7, 8 and 15 are admitted and it would not be necessary to introduce testimony to support those allegations.

Mr. Mason: Well, I don't believe that they are admitted. [65]

The Court: Well, that is the purpose for this hearing.

Mr. Mason: As I said, as shown here on Page 9 of this memorandum, it says, "That he has no information or knowledge sufficient to form a belief

as to the truth of the matters alleged", and that statement, under Rule 8 (b) of the District Court Rules, has the effect of a denial and places the burden of proof upon the plaintiff. Now, accompanying that denial or the equivalent of a denial is the statement of lack of interest and lack of funds, a desire to avoid a trial or judgment for costs, in consequence of which the defendant says, 'and to avoid judgment for costs, he admits the allegations'. That sort of a qualified admission, to my mind, is almost the same as a denial. It emphasizes a denial for a lack of information.

Mr. Strouss: Of course, as we see it, that is not a qualified admission.

The Court: That may be true as far as the pleadings are concerned, but this is a hearing now to determine the allegations you have to prove and those you do not have to prove irrespective of the plea.

Mr. Mason: Yes. This memorandum is addressed, of course, only to the state of the issues as they appear from the pleadings and not to any modifications that may [66] appear today as a result of what the defendant or his counsel may say.

The Court: Well, then, to go back to the complaint, all of Paragraph 1, apparently, is admitted except, as I stated before, the beginning of line 15 on Page 2— "As such, under the Constitution and laws of that state, there is vested in him the exclusive power, and upon him is imposed the mandatory duty, to commence and prosecute and to di-

rect the institution and prosecution of, suits for penalties for every violation of the Arizona Train-Limit Law, the statute, the validity of which constitutes the subject-matter of the instant controversy."

Now it is true, you admit all of Paragraph 1?

Mr. Strouss: Yes, we admit that latter part involved, but in the case of a constitutional law.

Mr. Booth: Do you admit it in case the law is considered constitutional?

Mr. Strouss: Of course, that is for argument, Mr. Booth, if your statement that the law is presumed to be constitutional is a correct statement of the law.

Mr. Booth: Assuming it is a correct statement, would that be——

Mr. Strouss: No, I would not admit that he has the duty to enforce a law merely by reason—by the presumption of its constitutionality. I don't think that is the law. [67] That, however, is a legal question and not a question of fact.

Mr. Mason: Do you contend, Mr. Strouss, that the defendant could excuse a failure to enforce this law if a violation was called to his attention, by saying that in his opinion it was unconstitutional?

Mr. Strouss: I certainly do.

Mr. Mason: If he were sued upon his official bond or writ of mandate were issued against him?

Mr. Strouss: I don't think there would be any liability, is my opinion.

Mr. Mason: You take the view, then, that he can determine for himself if the law was constitutional?

Mr. Strouss: I think that is the business of the Attorney General——

The Court: What part do the courts play in this scheme?

Mr. Strouss: He might be wrong honestly. I don't think there is any liability upon his official bond. That is what Mr. Mason asked. He has the right, I think, to determine for himself whether—in the first instance whether, in his opinion, the law is constitutional or unconstitutional. Some courts may disagree with him. The court may hold the law is constitutional, but if he is acting in good faith, there is no liability on his part. [68]

Mr. Booth: Well, here is a rather phenomenal situation, if the court please, that is produced by counsel's position. Now it is perfectly apparent that in the case of a police statute, such as this; that is, because of this very statute, the determination on the constitutionality or unconstitutionality of a statute depends upon the examination of a very large mass of facts. The question of unreasonableness depends on the examination of the facts as to whether the law is productive of safety, or whether, as we claim, is the contrary, and that, in turn, is dependent upon matters and statistics of a great many other things which were developed in the first Arizona Train-Limit case and which was affirmed by the 3-judge court, or rather adopted by the 3-judge court and is on file in this court.

Now, on the question of interference with and a burden upon interstate commerce, that depends

upon examination of a great number of facts, all of which were examined in the Arizona Train-Limit case and are set forth in the Master's report, in summary, and adopted by the 3-judge court, and as to the point of extra territorial operation, that, of course, can't be determined by going down on the same line and looking over in New Mexico or California. That is the subject of production of a great mass of facts. [69]

Now, the defendant, in the face of that, takes this very peculiar position. He is the Attorney General of the state. The duty is cast upon him by the Constitution and his oath of office to enforce the laws of this state. He says that he has not made an examination of the facts, that he is unable to do so due to lack of funds, or this, that or the other reason. The law unquestionably, according to the decisions cited in our memorandum, presumes this law to be constitutional until proven otherwise by a court of competent jurisdiction, and yet, having made no such examination and apparently as an individual being unable to make it physically, and saying he is unable to have it made financially, he makes this very equivocal sort of denial, and he has not said yet anything that amounts to an out and out admission of these allegations in the answer, or to a denial of the allegations in the answer.

Now, consider for a moment our position in this case; we are being very seriously hurt financially by the continued threat of enforcement of this law. The threat hangs over us by the very existence of

the law itself and by the attitude of the Attorney General with respect to it, and he has never said he would not enforce it——

Mr. Mason: He insists, of course, he never will say that.

Mr. Booth: As far as the pleadings are concerned, he [70] does not say he will not enforce it. He does not say "You haven't anything to be afraid of, I won't enforce this law, therefore, there is no controversy". In effect, by those other allegations and by this form of denial which, in my practice I have never had occasion to see any denial of that kind, especially in an equity case or quasi-equity case where there is the question of candor and fairness on the part of the defendant, he apparently endeavors, by this form of denial, to anchor us in a position from which we can't extricate ourselves without producing the facts before the court upon which or from which a conclusion will follow that these sections of the Federal Constitution are violated.

It seems to me, without wanting to make a speech on it, it is a most unusual situation when a very substantial property-holder and one of the largest taxpayers in this State is subject to this daily expense, and the Attorney General feels that he can keep it from obtaining any judicial examination on whether it should be subjected to the expense or not, simply by saying 'he hasn't any money to make an investigation' which, it is very evident, it will require considerable money to make, and he has had years in which to do that.

The Court: Well, we have only gone as far as the first paragraph, Mr. Booth. [71]

Mr. Booth: Yes.

Mr. Strouss: Of course, one thing that your Honor will have to keep in mind in respect to what Mr. Booth has said, and that is, this case is an unusual case, in the respect that here is an effort to make an individual defend a state law. Now, it may be that this law was causing all the damage that they are asserting here, but it is not the fault of the individual and certainly he should not be called upon, or any other individual, to defend this law. That is what they are attempting to do under this action, suing Mr. Conway as an individual.

Mr. Booth: It is the fault of this individual only as Attorney General of Arizona.

Mr. Strouss: And, of course, naturally he has no comment to make on why he has not said whether he would or would not enforce the law. He has said honestly that he does not know, he hasn't made any investigation to determine whether the law is unconstitutional or not, and he would be a very foolish man if he did because, of course, the minute he does this, he, as an individual, is compelled to come in and defend the action which may result in a judgment of 30 or 40 thousand dollars against him for costs.

Mr. Mason: It can't possible be so much.

Mr. Strouss: It can't be so much under the status [72] of this action at the present time, but if the action is to be defended, there are probabili-

ties of appeal where, certainly, Mr. Conway, as an individual, should not be called upon to pay the expenses. It does not make any difference to him, as an individual, whether the law is sustained or not sustained.

Mr. Mason: Aren't we in the same position, as far as the last argument is concerned, that his individual capacity as a state officer as recited in Terace versus Thompson; Pierce versus Society of Sisters; Banton versus Belt Line; Ex-parte Young——

Mr. Strouss: An Ex-parte ruling?

Mr. Mason: Yes, Ex-parte. Mr. Strouss knows these cases better than I do.

The Court: All right, go on to Paragraph 2 of the petition. Sub-division A is denied.

Mr. Mason: May I ask opposing counsel, do you really deny, Mr. Strouss, that the suit is in the nature of an equity suit?

Mr. Strouss: Well, to be frank, I don't know whether declaratory acts under the Federal Constitution is one of equity or one of law. I have not found any decisions to determine that yet.

Mr. Mason: As I understand the discussion of the subject by a recognized authority, which is Borchard on [73] Declaratory Judgments, that a suit for declaratory judgment may be equitable in nature or it may be in the nature of a suit at law, but the determination depends upon the suit itself, and having in mind the character of this suit, would you say that it is of equitable nature, rather than legal in nature?

Mr. Strouss: Well, I don't think there is anything particular in this action——

The Court: That would probably be a legal question, anyway.

Mr. Strouss: Yes.

The Court: The portion that I can see that he objects to or denies, is the latter portion. He says: "—and presents an actual controversy between the plaintiff and the defendant as more fully appears hereafter, which may be finally adjudicated and determined as between said parties". Sub-division B is also denied.

Mr. Mason: I don't see any denial of Sub-division B, to the point that a right in controversy has a value of $3,000.00 that exists. Is it intended to deny the value?

Mr. Strouss: Well, if it is in controversy, we will admit that it exceeds $3,000.00.

Mr. Mason: Do you deny that right exists?

Mr. Strouss: I don't understand you.

Mr. Mason: Do you deny the right to operate long [74] trains in Arizona exists?

Mr. Strouss: If this law is constitutional, I presume it is. I don't know whether it does or does not until there is some determination on that question.

Mr. Mason: As I understand your last answer to be, that if the law is unconstitutional the right exists, or if the law is constitutional, the right does not exist.

Mr. Strouss: To operate a long train?

Mr. Mason: Yes.

Mr. Strouss: Yes. That is true if the law is constitutional, it prevents you from operating a freight train in excess of 70 cars, and a passenger train in excess of 14.

The Court: Paragraph C is also denied. Will you admit Paragraph D?

Mr. Baker: Paragraph 2-D, your Honor?

The Court: Yes, Paragraph 2-D.

Mr. Strouss: Yes, that is correct.

The Court: Well then, it won't be necessary to offer any evidence on that score.

Mr. Mason: Do you admit Paragraph 2-D in its entirety, Mr. Strouss?

Mr. Strouss: Yes, that is correct.

The Court: Do you deny Paragraph 2-E?

Mr. Strouss: That is correct.

The Court: All right, pass then to Paragraph 3. [75] Do you admit all of Paragraph 3?

Mr. Strouss: That is correct.

The Court: All of Paragraph 4?

Mr. Strouss: That is correct.

The Court: Also the whole of Paragraph 5?

Mr. Strouss: That is correct.

The Court: And you admit the whole of Paragraph 6?

Mr. Strouss: That is correct.

The Court: And Paragraph 7?

Mr. Strouss: That is correct.

The Court: And the whole of Paragraph 8?

Mr. Strouss: That is correct.

The Court: And 9?

Mr. Strouss: That is correct.

The Court: Also 10?

Mr. Strouss: That is correct.

The Court: And 11?

Mr. Strouss: That is correct.

The Court: Also Paragraph 12?

Mr. Strouss: That is correct.

Mr. Mason: A sentence in Paragraph 12 reads: "Said train-limit law is unconstitutional and void, as to each and all of the interstate trains of the plaintiff——". Do I understand you to admit that, Mr. Strouss?

Mr. Strouss: My answer has been given. [76]

Mr. Booth: Well, I am a little bit puzzled whether counsel means in admitting, that he construes the allegations of his answer to admit them, or that he now admits them as actual facts well pleaded?

The Court: He admits the facts pleaded at this time.

Mr. Booth: Well then, he does not stand on his answer any longer, because his answer denies them for lack of information and belief.

Mr. Mason: Every one that has been referred to now, except Paragraph 4 and the Paragraphs 1 and 2 which we discussed at first. Paragraph 4 is only a text of the train-limit law which we admitted in the answer. These others are all denied for lack of information and belief, coupled, I believe, with the equivocal admission on account that he desire to avoid expenditure.

The Court: Well, they are admitted now; I say, they are admitted now.

Mr. Mason: Then the answer, the paragraph in the answer with reference to these particular paragraphs that were admitted by Mr. Strouss orally just now, those paragraphs or things are withdrawn or amended to that extent?

Mr. Strouss: No, they are not amended to that extent. They are admitted, those paragraphs referred to, for the purpose of trial and eliminates a necessity for presenting [77] evidence.

The Court: Now, how far did we get?

Mr. Booth: I hope the court will pardon my insistence, but I'd like to understand whether this is equivalent, for example, to a defendant making a proper denial, and unequivocal denial of the allegations in the answer, and then when the case is called for trial, not a pre-trial, but the actual trial, when the trial is about to begin, the defendant says, "For the purposes of this trial, I will admit this allegation in the answer denying Paragraph No. 3", we will say, of the answer. Notwithstanding the averment, he will say, "I will admit the allegations in the complaint, say, Paragraph 3, notwithstanding my denial of this allegation in the answer". Is that the process we are going through now, or is this "That is correct" in answer to the court's questions just a fall off the back stairs and we relying again on what I call "left-handed denials on the answer"? I'd like to know where we stand on this in the production of testimony.

The Court: Well, it won't be necessary to introduce any testimony under counsel's statement. He admits this allegation. It is not necessary to offer any proof. The purpose of this pre-trial hearing is to save all this time in court. Those allegations which are admitted as true, you don't have to prove.

[78]

Mr. Baker: We already reached Paragraph 12. As I understand, you admit the allegations contained in Paragraph 12?

Mr. Strouss: That is correct.

Mr. Whitney: And those equivocal admissions of all the allegations?

The Court: Why, certainly. That is what these hearings are all for. Paragraph 13. The allegations of that paragraph are admitted. No proof will be necessary on that, on those allegations.

Mr. Mason: Of course, Paragraphs 12 and 13 which the court has now reached are allegations on conclusions of law, rather than matters of fact?

The Court: Well, that is true in a good many instances.

Mr. Mason: Yes.

Mr. Strouss: My answer as to the court's question is, yes, that is correct.

Mr. Mason: I take it, then, Mr. Strouss, that the defendant admits Paragraphs 12 and 13 as statements of law, as well as statements of fact?

Mr. Strouss: Well, you can take it that way. I am admitting the allegations of those two paragraphs.

The Court: Also Paragraph 14 is admitted?

Mr. Strouss: That is correct. [79]

The Court: Paragraph 15 is denied in toto?

Mr. Booth: Just a moment. The second paragraph—paragraph 15, beginning on line 29 of Page 29 of the plaintiff's complaint, and the succeeding paragraphs—no, the second paragraph beginning on line 29 of page 29 and the third paragraph beginning on line 8 of Page 30 has nothing to do with the controversy in the case as I read it. In other words, if a denial stands, we will have to prove that we could and would at once begin, and hereafter continue to operate a substantial number of freight and passenger trains, and so forth. We would also have to prove the allegation beginning on line 8 of Page 30, that we are presently unwilling and unable to undertake such long train operations, and so on.

The Court: If you have to prove that, you can do it in about 5 minutes.

Mr. Baker: Paragraph 15, you deny, is that correct?

Mr. Strouss: Yes.

Mr. Baker: He says he will require proof thereof.

Mr. Strouss: I don't remember the allegation that Mr. Booth referred to. I would not want to now, without reading the paragraph a little more carefully, say I will admit or deny it more than I have in the answer.

Mr. Baker: That is all right, Mr. Strouss. I just want to be sure you are denying all the allegations in that [80] paragraph.

The Court: All right, Paragraph 16?

Mr. Strouss: Well, if the court please, I want to correct something there. If there is any allegation which I have omitted answering in my answer, of course, under the Rules of Pleading and the Rules of the Court, those allegations stand admitted. I don't want, by Mr. Baker's statement, to be put in the position of having said I denied something which I didn't deny. What I deny is set forth in my answer. Now, if we want to stop and analyze that section——

The Court: Well, you probably admit that, the part that Mr. Booth referred to. Have you got a copy of the petition there? If so, beginning with line 29—"If it were not for said law and the position and opinion with regard to the constitutionality and validity thereof maintained by defendant, as aforesaid, plaintiff could and would at once begin and hereafter continue to operate a substantial number of its freight and passenger trains—", and so forth. I think that is to be conceded by anyone.

Mr. Strouss: Yes, we will admit that. Well, now, except this, that if it were not for the difference in opinion in regard to the constitutionality, we don't admit their failure to operate trains is due to the opinion of the defendant as to the constitutionality or unconstitutionality [81] of the law. We deny that the defendant has any opinion as to the consti-

tutionality or unconstitutionality of the law, so there is no admission that the failure to operate trains is due to his opinion as to the constitutionality or unconstitutionality of the law.

The Court: Well then, you might say the lack of opinion, if it were not for his lack of opinion.

Mr. Strouss: Well, if they want to allege it that way, why that is—but except as to that particular part of the allegation, we admit the allegation. We don't admit the failure to operate is due to any opinion of the Attorney General or the defendant.

Mr. Mason: You do admit, Mr. Strouss, that the failure to operate is due to the law, because we allege if it were not for the law the plaintiff would begin at once to operate long trains.

Mr. Strouss: Well, I assume that is true and so admit it.

Mr. Mason: And you admit that we would thereby effect increased economy and efficiency and greater safety in operations by such long trains?

Mr. Strouss: You allege that is true, and we assume it is. We admit it.

Mr. Mason: Well, coupling it with the preceding, we say that if it were not for the law, we could commence [82] long train operations and it reads this, that we "would thereby and thereupon at once begin and thereafter continue to effect the increased economy and efficiency and the greater safety of operation which, as heretofore set forth in detail, are and would be attendant upon and caused by such long-train operation".

Mr. Strouss: Yes, that is true.

The Court: Well then, the other paragraph referred to by Mr. Booth, beginning on line 8 of Page 30: "Plaintiff is presently unwilling and unable to undertake such long-train operations within—", and so forth. In the absence of final determination, you will admit that too, will you?

Mr. Strouss: Yes, I will admit that—wait until I read it so I will see there is nothing in here that says it is due to the opinion of the——

The Court: Do you have a copy?

Mr. Strouss: Yes, I have a copy.

(Thereupon the document was examined by Mr. Strouss.)

Mr. Strouss: Yes, I will admit that. However, not in any way do we admit that it is due to any opinion of the defendant..

The Court: 16, the whole of 16 is admitted?

Mr. Strouss: Is admitted, yes.

The Court: And also the whole of 17? [83]

Mr. Strouss: That is true.

The Court: Well, apparently that does not leave much to prove.

Mr. Booth: Mr. Whitney calls my attention to Rule 16 of the Rules of Civil Procedure which, after providing for the direction by the court for the attorneys to appear before it for a pre-trial conference, provides in the last paragraph that thereupon the court shall make an order, and so forth, and I assume that that will be done.

The Court: Well, I will ask the reporter to write up the portions of the complaint that are admitted and it will be filed as a stipulation in the case. It will be unnecessary to offer any proof on any of those admitted matters.

Mr. Booth: It says, "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties——".

Mr. Baker: Your Honor will furnish a copy of the order made?

The Court: Yes.

Mr. Strouss: That order will be issued and made in accordance with the admissions made in the pre-trial procedure conference?

The Court: Yes. Anything else, gentlemen? [84]

(No response.)

(Thereupon the pre-trial hearing was ended.)

I, hereby certify, that the proceedings had and evidence given upon the hearing of this Pre-trial Conference is contained fully and accurately in the shorthand notes taken by me of said hearing, and that the foregoing 21 typewritten pages contain a full, true and accurate transcript of the same.

(Sgn.) LOUIS L. BILLAR,
Official Shorthand Reporter.

[Endorsed]: Filed Nov. 6, 1939. [85]

[Title of District Court and Cause.]

ORDER

At a Pre-Trial Conference had on November 3d, 1939, in the above entitled cause, the following admissions of fact were made by counsel for defendant:

I.

The allegations set forth in the following paragraphs of the complaint were admitted as true: Paragraphs I, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XVI and XVII.

II.

Paragraphs II(a), (c) and (e) were denied. In reference to the allegations of II(b), while defendant's counsel refused to admit that a controversy exists between the parties, he stated that if it were determined such controversy does exist, in that event, he would admit the matter in controversy to be in excess of $3,000.00.

III.

Defendant denied that portion of page 29, paragraph XV, beginning at line 13 to and including line 28 on said page. Defendant admitted that portion of paragraph XV, beginning at line 29, page 29, to and including line 7, page 30, except the following portion of said paragraph on page 29, lines 29, 30 and 31, reading as follows: "And the position and opinion with regard to the constitutionality and validity thereof maintained by defendant". De-

fendant admitted that portion of paragraph XV, [86] beginning line 8, page 30 to and including line 16 on said page. Defendant denied that portion of paragraph XV beginning on line 17, page 30 to and including line 24 on said page.

At the trial of said cause, plaintiff will not be required to offer proof in support of any of the admitted allegations of the complaint.

Dated: December 1st, 1939.

DAVE W. LING,

Judge.

[Endorsed]: Filed Dec. 1, 1939. [87]

[Title of District Court and Cause.]

MOTION TO AMEND ORDER

Comes now the defendant and moves the Court that the Order entered herein on December 1, 1939, following the Pre-Trial Procedure, be amended to read as follows:

1. Paragraph I of said order be amended to read:

> "The allegation set forth in the following paragraphs of the complaint were admitted as true: Paragraphs I(a), II(d), III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XVII.

2. Insert following paragraph I of the Order the following:

"I-A

"Defendant admitted the allegation contained in paragraph I(b) beginning with line 11, page 2, and ending with line 15, page 2, reading as follows:

"'(b) Defendant, Joe Conway, is sued as an individual, and not in his official capacity. Said defendant is a citizen of the State of Arizona, residing in the City of Phoenix, County of Maricopa, in said State, and is the duly elected, qualified and acting Attorney General of the State of Arizona.'

"Defendant denied the allegation contained in paragraph I(b) beginning with line 15, page 2, and ending with line 21, page 2, reading as follows:

"'As such, under the Constitution and laws of that state, there is vested in him the exclusive power, and upon him is imposed the mandatory duty, to commence and prosecute and to direct the institution and prosecution of, suits for penalties for every violation of the Arizona Train-Limit Law, the statute the validity of which constitutes the subject-matter of the instant controversy.'"

[88]

3. Insert following paragraph III of the Order the following:

"IV.

"Defendant admitted the allegations of paragraph XVI except the allegation appearing in lines 25, 26 and 27, page 31, reading as follows:

"'* * * said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said Act which it may commit.'

which allegation defendant denied."

CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant,
703 Heard Building,
Phoenix, Arizona.

[Endorsed]: Filed Dec. 12, 1939. [89]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF DECEMBER 12, 1939

(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

This case comes on regularly for trial this day before the Court sitting without a jury.

Henley C. Booth, Esquire, Burton Mason, Esquire, and Louis Whitney, Esquire, appear as counsel for the plaintiff. The defendant, Joe Conway, is present with his counsel Charles Strouss, Esquire, and W. E. Polley, Esquire.

Both sides announce ready for trial.

Henry Larson is present as reporter.

Charles Strouss, Esquire, now files Motion to Amend Order of December 1, 1939, following pretrial conference.

Argument is now had by respective counsel, and

It is ordered that said Motion to Amend Order of December 1, 1939, be and it is granted.

Plaintiff's Case:

The following plaintiff's exhibits are now admitted in evidence:

1. Affidavit of Joe Conway.
2. Notice of taking deposition.

On motion of Burton Mason, Esquire,

It is ordered that the Clerk open the deposition of Joe Conway.

Plaintiff's exhibit 3, Deposition of Joe Conway, is now admitted in evidence.

Whereupon, the plaintiff rests. [90]

And the defendant rests.

Both sides rest.

Defendant now renews motion to dismiss, heretofore filed.

Arguments is had by respective counsel.

On motion of Burton Mason, Esquire,

It is ordered that the record made at the pretrial conference herein be considered as having been made a part of the trial proceedings on this date.

Whereupon, it is ordered that this case and said Motion to Dismiss be submitted and by the Court taken under advisement.

It is further ordered that reporter Henry Larson be allowed to withdraw plaintiff's exhibits 2 and 3 for use in preparing transcript, upon his receipting therefor. [91]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF FRIDAY, FEBRUARY 9, 1940

(Phoenix Division)
Honorable Dave W. Ling,
United States District Judge, Presiding

[Title of Cause.]

This case having been submitted and by the Court taken under advisement,

It is ordered that this case be and it is dismissed. [92]

[Title of District Court and Cause.]

DRAFT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW, SUBMITTED BY DEFT.

Findings of Fact:

1. That the defendant, Joe Conway, is sued in his individual capacity.

2. That in his individual capacity the defendant has no legal interest in the determination of the

constitutionality or unconstitutionality of the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

3. That the defendant has neither formulated nor expressed an opinion that the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928) is constitutional.

4. That the defendant has not threatened to enforce the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

5. That the defendant has taken no action toward enforcing the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

Conclusions of Law:

1. That the defendant, in the capacity in which he is sued, has no legal interest which will be affected by a declaratory judgment determining the constitutionality or unconstitutionality of the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928). [93]

2. That no case or controversy is presented within the judicial power of the United States courts.

Dated February ....., 1940.

.....,

District Judge.

[Endorsed]: Filed Feb. 14, 1940. [94]

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED AMENDMENTS AND ADDITIONS TO "DRAFT OF FINDINGS OF FACT AND CONCLUSIONS OF LAW" PRESENTED BY DEFENDANT.

Now comes the plaintiff, and excepts and objects to the Findings of Fact and Conclusions of law set forth and proposed in the "Draft of Findings of Fact and Conclusions of Law" served and filed by defendant under date of February 13, 1940, and to each and all of said findings of fact and conclusions of law, upon the ground that the same are, and each of them is, erroneous, insufficient, improper and defective, in that they do not, either severally or collectively, present the material and ultimate facts disclosed by the record, or present the true, proper and correct conclusions of law predicated upon the material and ultimate facts so disclosed; and plaintiff, therefore, proposes and requests that the Court make and adopt the following special findings of fact and conclusions of law in lieu of those proposed and requested by defendant, as aforesaid:

This cause came on regularly for trial before the Court on December 12, 1939, Honorable Dave W. Ling, United States District Judge, presiding and sitting without a jury. [95] Plaintiff was represented by its attorneys, Alexander B. Baker, Esq., Louis B. Whitney, Esq., Henley C. Booth, Esq., and Burton Mason, Esq. Defendant appeared in person and was also represented by his attorneys, Charles

L. Strouss, Esq. and W. E. Polley, Esq. Evidence was duly offered by and on behalf of the plaintiff, and received by the Court. Defendant offered no evidence, but upon the conclusion of plaintiff's testimony renewed his motion to dismiss the complaint for lack of jurisdiction, which motion had theretofore been presented by him to the Court on May 5, 1939, and by the Court denied, by order dated June 26, 1939. Said motion was thereupon argued by counsel for the respective parties, and the cause duly submitted for decision.

Now, therefore, having duly considered all of the evidence, and the admissions of the defendant, and the arguments of counsel, and being duly advised, the Court does hereby, pursuant to Rule 52 of the Federal Rules of Civil Procedure, make and adopt the following as its Special Findings of Fact and Conclusions of Law in this cause:

SPECIAL FINDINGS OF FACT

I.

Each and all of the allegations of the following paragraphs of the complaint herein have been and are admitted and conceded by the defendant to be true and correct, and are, therefore, hereby found to be true and correct, to-wit: Paragraphs I(a), II(d), III, IV, V, VI, VII, VIII, IX, X, XI and XVII.

II.

Defendant, Joe Conway, is a citizen of Arizona, residing in the City of Phoenix, Maricopa County,

in said state, and is the duly elected, qualified and acting Attorney General of Arizona. The constitution and laws of Arizona vest in the Attorney General of that state the exclusive power and duty [96] to commence and prosecute or direct the prosecution of suits or penalties for every violation of the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

III.

It is the statutory duty of the Attorney General of Arizona, expressly imposed upon him by Section 3 of said Train Limit Law, to enforce the provisions thereof if and when the same are violated. Defendant admits that it now is and in future will continue to be his official duty to prosecute, in accordance with the terms of said law, for each and every violation thereof; and declares further that he never has stated, and never will state, that having in mind his official oath of office as Attorney General, he will refuse to enforce said law, or will refrain from efforts to enforce it.

IV.

In handling the interstate freight traffic moving over its lines across the State of Arizona, plaintiff operates daily in each direction between its freight terminals at Yuma, Arizona, and Gila, Arizona, and between its freight terminals at Gila and Tucson, Arizona, and between its freight terminals at Tucson and Lordsburg, New Mexico, a substantial number of through interstate freight trains, all of which

move over the line heretofore described as the Yuma-Maricopa-Lordsburg Line. The number of such trains so operated each day varies according to the demands of traffic and ranges from approximately 75 trains per month on the average, in each direction between Yuma and Gila, and 75 trains per month in each direction between Gila and Tucson, and 90 trains per month in each direction between Tucson and Lordsburg, during the month of November, to 180 trains per month in each direction between Yuma and Gila, and 180 trains per month in each direction between Gila and [97] Tucson, and 200 trains per month in each direction between Tucson and Lordsburg, during the month of June; which said months of November and June represent the months during the year when such interstate traffic across Arizona is lightest and heaviest, respectively.

If plaintiff were to disregard the provisions of the Arizona Train-Limit Law, and were to attempt to operate each of its aforesaid freight trains within or across the State of Arizona with more than 70 cars each, exclusive of caboose, it would thereby become subject to prosecution for the recovery of the severe penalties provided by Section 3 of said Train-Limit Law, which said Section provides a penalty of not less than $100.00 nor more than $1,000.00 for each such violation. As heretofore set forth, defendant admits that it now is, and in future will continue to be, his official duty to prosecute, in accordance with the terms of said law, for

each and every violation thereof which may occur. Plaintiff thus would become liable for penalties, in the event the defendant should institute such prosecutions, as directed and required by said Section 3, which, in the event said law should be sustained in said prosecutions, would range, on the average, from $1,600.00 to *$1,600.00* per day during the period of lightest traffic, and from $3,700.00 to $37,000.00 per day during the period of heaviest traffic; and said penalties would be and will be cumulative, and may or might be recovered by said defendant, in a single prosecution, or in a series of prosecutions instituted for that purpose, unless said law be declared invalid and unconstitutional by final judgment as herein prayed for. Said penalties would be additional to any penalties which might be incurred by the operation of freight trains of more than 70 cars, exclusive of caboose, upon the Wellton-Phoenix-Picacho or Tucson-Douglas main lines, heretofore described, or upon any [98] of the branch lines in Arizona, or of passenger trains of more than 14 cars upon any part of the plaintiff's lines in Arizona.

If, on the other hand, plaintiff should continue to comply with said law, and should continue to operate all of its freight trains upon its lines within the State of Arizona, and the adjacent districts in which the law now has extraterritorial effect, with not more than 70 freight or other cars, exclusive of caboose, and were to continue to operate all of its passenger trains within Arizona and said adja-

cent districts with not more than 14 cars each, the added expense thus imposed upon plaintiff, solely as the result of said compliance, would be and will continue to be, as heretofore more fully alleged, not less than $300,000.00 per year, or, on the average, not less than approximately $822.00 per day, all of which such added expense is and will be continuous and irreparable.

V.

An actual controversy has arisen and now exists, between the plaintiff and the defendant, with regard to their respective rights, duties, powers, and obligations under and pursuant to said Train Limit Law: in that plaintiff, on the one hand, claims and maintains that said law is wholly invalid and unconstitutional as to plaintiff's interstate trains, and that consequently no power or duty to prosecute or sue plaintiff for violation thereof exists or is vested in defendant, either as Attorney General of Arizona, or as an individual purporting to act under color of that office; whereas defendant, on the other hand, admits that by its terms said law imposes upon him, as said Attorney General, the power and duty of prosecution for each and every violation thereof, and also admits, as aforesaid, that it is and will be his official duty to commence and continue or direct such prosecutions; and has further declared [99] that he, the defendant, has never said and never will say that, having in mind his oath of office as said Attorney General, he will refuse, or refrain from effort, to enforce said law.

If it were not for said law, plaintiff could and would at once begin and hereafter continue to operate a substantial number of its freight and passenger trains into, within, through, and across Arizona without regard to the restrictions and limitations imposed by said law; and would thereby and thereupon at once begin and thereafter continue to effect the increased economy and efficiency and the greater safety of operation which, as heretofore set forth in detail, are and would be attendant upon and caused by such long train operation. Plaintiff is presently unwilling and unable to undertake such long-train operations within, through and across Arizona, in the absence of a final determination and declaration that said law is invalid and unconstitutional as applied to its operations, because of the heavy cumulative penalties which, as hereinafter described, would shortly accrue if such a course were followed, and the law should be sustained in prosecutions instituted by or at the direction of the defendant for the purpose of enforcing said law and recovering the penalties therein provided.

CONCLUSIONS OF LAW

I.

The matter in controversy in this case, exclusive of interest and costs, greatly exceeds the sum or value of $3,000.00; and this case is a suit of a civil nature, for declaratory relief, between citizens of different states, and arises under the Constitution and Laws of the United States; therefore this

Court has jurisdiction over the subject matter [100] of the case, and of the parties thereto.

II.

Under the Constitution and laws of Arizona, and particularly by the express terms of the Arizona Train Limit Law, power and duty are conferred upon and vested in the duly elected, qualified, and acting Attorney General of Arizona, to enforce said law by commencing and prosecuting or directing the prosecution of suits for penalties for every violation of said Train Limit Law; and said defendant admits and asserts that it is and will be his official duty, in his capacity as such Attorney General, to prosecute and sue plaintiff for each and every violation of said law which it may commit; and said defendant has further stated and declared that he has never said and never will say that, having in mind his official oath, he will refuse to enforce said law, or refrain from effort to enforce it.

The damage and injury which plaintiff daily sustains and will continue to sustain by reason of said Train Limit Law, and the exercise of the aforesaid power and duty of enforcement claimed and asserted by defendant to exist and to be vested in himself, are and will be great and irreparable; but by reason of the provisions of said law, plaintiff cannot safely disregard the same, and await or invite prosecutions thereunder, for the purpose of obtaining a judicial determination whether said law is valid and binding and the claimed power and

duty of prosecution thereunder exist, without being subjected to the severe and cumulative penalties which would and will shortly accrue if such a course were followed, and said law were sustained in prosecutions brought or directed by the defendant pursuant to the provisions thereof. [101]

Plaintiff, as a citizen and resident of the State of Kentucky, has no plain, speedy or adequate remedy at law in this or any other Court of the United States. Irrespective of its residence or citizenship in a state other than Arizona, plaintiff has no plain, speedy or adequate remedy at law in any court of the State of Arizona or of any other jurisdiction.

III.

Each and all of the conclusions of law set forth in Paragraphs XII, XIII and XIV of the complaint are admitted and conceded by the defendant to be true and correct in every respect; and the same, and each of them, are hereby adopted by the Court as part of its conclusions of law herein.

IV.

Plaintiff is entitled to a judgment and decree as prayed for in its Bill of Complaint, declaring that said Train Limit Law is arbitrary and unreasonable in and of itself, and is void and unconstitutional in the respects and for the reasons set forth in Paragraphs XII, XIII and XIV of plaintiff's complaint, and is therefore invalid and unenforcible as

to plaintiff and each and all of plaintiff's railroad operations in the State of Arizona; and declaring further that defendant has no power or duty, lawfully or constitutionally imposed upon or vested in him, either in his capacity as Attorney General or otherwise, to enforce said Train Limit Law or to subject plaintiff to suits or prosecutions for penalties for any violation thereof, which said plaintiff may commit in the course of any of its aforesaid railroad operations.

Dated this.....day of February, 1940.

.....

Judge of the United States District
Court for the District of Arizona

[102]

Respectfuly submitted,

ALEXANDER B. BAKER
LOUIS B. WHITNEY
Solicitors for Plaintiff
703 Luhrs Tower
Phoenix, Arizona

C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
Of Counsel
65 Market Street
San Francisco, California

[Endorsed]: Filed Feb. 14, 1940. [103]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court on December 12, 1939, Honorable Dave W. Ling, United States District Judge, presiding and sitting without a jury. Plaintiff was represented by its attorneys, Alexander B. Baker, Esq., Louis B. Whitney, Esq., Henley C. Booth, Esq. and Burton Mason, Esq. Defendant appeared in person and was also represented by his attorneys, Charles L. Strouss, Esq. and W. E. Polley, Esq. Evidence was duly offered by and on behalf of the plaintiff, and received by the Court. Defendant offered no evidence, but upon the conclusion of plaintiff's testimony renewed his motion to dismiss the complaint for lack of jurisdiction, which motion had theretofore been presented by him to the Court on May 5, 1939, and by the Court denied, by order dated June 26, 1939. Said motion was thereupon argued by counsel for the respective parties, and the cause duly submitted for decision.

Now, therefore, having duly considered all of the evidence, and the admissions of the defendant, and the arguments of counsel, and being duly advised, the Court [104] does hereby, pursuant to Rule 52 of the Federal Rules of Civil Procedure, make and adopt the following as its Special Findings of Fact and Conclusions of Law in this cause:

SPECIAL FINDINGS OF FACT

I.

Defendant, Joe Conway, who is sued in his individual capacity, is a citizen of Arizona, residing in the City of Phoenix, Maricopa County, in said state, and is the duly elected, qualified and acting Attorney General of Arizona. The constitution and laws of Arizona vest in the Attorney General of that state the exclusive power and duty to commence and prosecute or direct the prosecution of suits or penalties for every violation of the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

II.

That the defendant has not threatened to enforce the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

III.

That the defendant has taken no action toward enforcing the Arizona Train Limit Law (Section 647, Revised Code of Arizona, 1928).

IV.

Section 647, Revised Code of Arizona, 1928, reads in part as follows: "And such penalty shall be recovered, and suits therefor brought by the Attorney General, or under his direction, in the name of the State of Arizona, in any county through which such railway may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals." [105]

V.

In handling the interstate freight traffic moving over its lines across the State of Arizona, plaintiff operates daily in each direction between its freight terminals at Yuma, Arizona, and Gila, Arizona, and between its freight terminals at Gila and Tucson, Arizona, and between its freight terminals at Tucson and Lordsburg, New Mexico, a substantial number of through interstate freight trains, all of which move over the line heretofore described as the Yuma-Maricopa-Lordsburg Line. The number of such trains so operated each day varies according to the demands of traffic and ranges from approximately 75 trains per month on the average, in each direction between Yuma and Gila, and 75 trains per month in each direction between Gila and Tucson, and 90 trains per month in each direction between Tucson and Lordsburg, during the month of November, to 180 trains per month in each direction between Yuma and Gila, and 180 trains per month in each direction between Gila and Tucson, and 200 trains per month in each direction between Tucson and Lordsburg, during the month of June; which said months of November and June represent the months during the year when such interstate traffic across Arizona is lightest and heaviest, respectively.

If plaintiff were to disregard the provisions of the Arizona Train-Limit Law, and were to attempt to operate each of its aforesaid freight trains within or across the State of Arizona with more

than 70 cars each, exclusive of caboose, it would thereby become subject to prosecution for the recovery of the severe penalties provided by Section 3 of said Train-Limit Law, which said Section provides a penalty of not less than $100.00 nor more than $1,000.00 for each such violation. Plaintiff thus would become [106] liable for penalties, in the event the defendant should institute such prosecutions, as directed and required by said Section 3, which, in the event said law should be sustained in said prosecutions, would range, on the average, from $1,600.00 to $16,000.00 per day during the period of lightest traffic, and from $3,700.00 to $37,000.00 per day during the period of heaviest traffic; and said penalties would be and will be cumulative, and may or might be recovered by said defendant, in a single prosecution, or in a series of prosecutions instituted for that purpose, unless said law be declared invalid and unconstitutional by final judgment as herein prayed for. Said penalties would be additional to any penalties which might be incurred by the operation of freight trains of more than 70 cars, exclusive of caboose, upon the Wellton-Phoenix-Picacho or Tucson-Douglas main lines, heretofore described, or upon any of the branch lines in Arizona, or of passenger trains of more than 14 cars upon any part of the plaintiff's lines in Arizona.

If, on the other hand, plaintiff should continue to comply with said law, and should continue to operate all of its freight trains upon its lines

within the State of Arizona, and the adjacent districts in which the law now has extraterritorial effect, with not more than 70 freight or other cars, exclusive of caboose, and were to continue to operate all of its passenger trains within Arizona and said adjacent districts with not more than 14 cars each, the added expense thus imposed upon plaintiff, solely as the result of said compliance, would be and will continue to be, as heretofore more fully alleged, not less than $300,000.00 per year, or, on the average, not less than approximately $822.00 per day, all of which such added expense is and will [107] be continuous and irreparable.

VI.

If it were not for said law, plaintiff could and would at once begin and hereafter continue to operate a substantial number of its freight and passenger trains into, within, through, and across Arizona without regard to the restrictions and limitations imposed by said law; and would thereby and thereupon at once begin and thereafter continue to effect the increased economy and efficiency and the greater safety of operation which, as set forth in detail in the complaint, are and would be attendant upon and caused by such long train operation. Plaintiff is presently unwilling and unable to undertake such long-train operations within, through and across Arizona, in the absence of a final determination and declaration that said law is invalid and unconstitutional as applied to its operations, because of the

heavy cumulative penalties which, as hereinafter described, would shortly accrue if such a course were followed, and the law should be sustained in prosecutions instituted by or at the direction of the defendant for the purpose of enforcing said law and recovering the penalties therein provided.

VII.

Each and all of the allegations of the following paragraphs of the complaint herein have been and are admitted and conceded by the defendant to be true and correct, and are, therefore, hereby found to be true and correct, to-wit: Paragraphs I (a), II (d), III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV and XVII. [108]

CONCLUSIONS OF LAW

I.

The matter in controversy in this case, exclusive of interest and costs, greatly exceeds the sum or value of $3,000.00; and this case is a suit of civil nature, for declaratory relief, between citizens of different states.

II.

That no case or controversy is presented within the judicial power of the United States courts.

Dated February 14, 1940.

DAVE W. LING,
District Judge.

[Endorsed]: Filed Feb. 14, 1940. [109]

In the District Court of the United States
for the District of Arizona

No. Civ. 31—Phoenix

SOUTHERN PACIFIC COMPANY,
(a corporation),

Plaintiff,

vs.

JOE CONWAY,

Defendant.

JUDGMENT

This cause came on to be heard by the Court at this term, and evidence was received, and the cause argued by counsel and duly submitted; and the Court having fully considered the pleadings, the evidence and the arguments of counsel, and Findings of Fact and Conclusions of Law having been made, adopted and filed by the Court; and the Court having found that no case or controversy is presented within the judicial power of the United States Court;

It is now ordered, adjudged and decreed in accordance with said Findings and Conclusions, that the plaintiff's complaint and action be and is hereby dismissed; and that defendant go hence without day.

Done in open court this 14th day of February, 1940.

DAVE W. LING,
United States District Judge.

Approved as to Form this 14th day of February, 1940.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.

[Endorsed]: Filed Feb. 14, 1940. [110]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, the above named plaintiff, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered by the District Court of the United States in and for the District of Arizona in the above named and numbered cause, under date of February 14, 1940, and from all of said judgment.

Dated this 15th day of February, 1940.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.
C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
of Counsel,
65 Market Street,
San Francisco, California.

[Endorsed]: Filed Feb. 15, 1940. [111]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky, as Principal, and Saint Paul Mercury Indemnity Company, a corporation organized and existing under the laws of the State of Delaware and authorized to transact a surety business in the State of Arizona, as Surety, are duly held and firmly bound, jointly and severally, unto Joe Conway, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Joe Conway, his heirs, executors, administrators, successors and assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Duly executed and sealed with our seals this 15th day of February, 1940.

Whereas, lately, at a trial held before the District Court of the United States in and for the District of Arizona, in a suit pending in said Court between said Southern Pacific Company, a corporation, plaintiff, and Joe Conway, defendant, a judgment was rendered against the said plaintiff dismissing said suit for want of jurisdiction, and said plaintiff intends [112] and proposes to appeal from the said judgment, and has this day duly filed, concurrently with this Bond, a Notice of Appeal from said judgment:

Now, therefore, the condition of the above obligation is such that if the said Southern Pacific Company, a corporation, plaintiff, shall prosecute said appeal to effect and pay all costs if the appeal be dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment be modified, then the above obligation to be void, otherwise to remain in full force and effect.

SOUTHERN PACIFIC COMPANY,
a corporation,
By ALEXANDER B. BAKER,
Its Attorney.

[Seal] SAINT PAUL MERCURY
INDEMNITY COMPANY,
a corporation.
By G. H. MYERS,
Its Attorney-in-Fact.

[Endorsed]: Filed Feb. 15, 1940. [113]

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW

Comes now the defendant and moves the Court to amend the Findings of Fact and Conclusions of Law, signed by the Court and filed herein, in the following particulars:

1. By striking from paragraph V of the Findings of Fact (lines 2 and 3 of page 4 of Findings of Fact and Conclusions of Law) the words and figures "as directed and required by said Section 3".

2. By striking the whole of paragraph I of the Conclusions of Law (lines 3 to 6, inclusive, page 6 of Findings of Fact and Conclusions of Law), which paragraph I is in words and figures as follows:

> "The matter in controversy in this case, exclusive of interest and costs, greatly exceeds the sum or value of $3,000.00; and this case is a suit of a civil nature, for declaratory relief, between citizens of different states."

CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant,
703 Heard Building,
Phoenix, Arizona.

[Endorsed]: Filed Feb. 16, 1940. [114]

[Title of District Court.]

October 1939 Term
at Phoenix

MINUTE ENTRY OF FRIDAY,
FEBRUARY 23, 1940
(Phoenix Division)

Honorable Dave W. Ling,
United States District Judge, presiding.

[Title of Cause.]

Defendant's Motion to Amend Findings of Fact and Conclusions of Law having been submitted and by the Court taken under advisement,

It is ordered that said Motion to Amend Findings of Fact and Conclusions of Law be and it is denied. [115]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Southern Pacific Company, a corporation, the above named plaintiff, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment rendered by the District Court of the United States in and for the District of Arizona in the above named and numbered cause, under date of February 14, 1940, and from all of said judgment.

Dated this 2nd day of March, 1940.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.
C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
of Counsel,
65 Market Street,
San Francisco, California.

[Endorsed]: Filed Mar. 2, 1940. [116]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky, as Principal, and Saint Paul Mercury Indemnity Company, a corporation organized and existing under the laws of the State of Delaware and authorized to transact a surety business in the State of Arizona, as Surety, are duly held and firmly bound, jointly and severally, unto Joe Conway, in the full and just sum of Two Hundred Fifty Dollars ($250.00), to be paid to the said Joe Conway, his heirs, executors, administrators, successors and assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Duly executed and sealed with our seals this 2d day of March, 1940.

Whereas, lately, at a trial held before the District Court of the United States in and for the District of Arizona, in a suit pending in said Court between said Southern Pacific Company, a corporation, plaintiff, and Joe Conway, defendant, a judgment was rendered against the said plaintiff dismissing [117] said suit for want of jurisdiction, and said plaintiff intends and proposes to appeal from the said judgment, and has this day duly filed, concurrently with this Bond, a Notice of Appeal from said judgment:

Now, therefore, the condition of the above obligation is such that if the said Southern Pacific Company, a corporation, plaintiff, shall prosecute said appeal to effect and pay all costs if the appeal be dismissed or the judgment affirmed, or such costs as the appellate court may award if the judgment be modified, then the above obligation to be void, otherwise to remain in full force and effect.

SOUTHERN PACIFIC COMPANY,
a corporation,
By ALEXANDER B. BAKER,
Its Attorney.

[Seal] SAINT PAUL MERCURY INDEMNITY COMPANY,
a corporation,
By G. H. MYERS,
Its Attorney-in-Fact.

[Endorsed]: Filed Mar. 2, 1940. [118]

[Title of District Court and Cause.]

STIPULATION FOR REFILING DOCUMENTS

It is hereby stipulated and agreed by and between counsel for plaintiff and defendant above named, that

Whereas the plaintiff did on February 15, 1940, file in the above court and cause the following documents, to-wit:

1. Notice of Appeal.
2. Bond on Appeal.

3. Appellant's Designation of Contents of Record on Appeal.

4. Two copies of Reporter's Transcript of Testimony.

5. Statement of Proceedings Had at Trial of Cause, Including Condensed Statement (in Narrative Form) of Testimony Received at Trial.

6. Statement by Plaintiff and Appellant of Points Upon Which It Intends to Rely on Appeal.

And whereas, defendant did on February 24, 1940, file in said court and cause the following documents:

1. Defendant's Notice of Testimony Required in Question and Answer Form.

2. Appellee's Designation of Additional Portions of Record on Appeal.

And whereas, plaintiff has, on March 2, 1940, in said court and cause filed a new Notice of Appeal, a new Bond on [119] Appeal, and a new Appellant's Designation of Contents of Record on Appeal,

Now, therefore, it is stipulated and agreed that it shall not be necessary for plaintiff and appellant to file or serve a new Statement of Proceedings Had at Trial of Cause, Including Condensed Statement (in Narrative Form) of Testimony Received at Trial, or a new Statement by Plaintiff and Appellant of Points Upon Which it Intends to Rely on Appeal, but the originals of said instruments shall be deemed redated as of March 2, 1940, and may be so redated, and shall be marked by the Clerk of said

Court as being refiled the same date and hour as the said Appellant's Designation of Contents of Record on Appeal filed on March 2, 1940.

It is further stipulated and agreed that it shall not be necessary for defendant and appellee to file or serve a new Defendant's Notice of Testimony Required in Question and Answer Form, or Appellee's Designation of Additional Portions of Record on Appeal, but the originals of said instruments shall be deemed redated as of March 2, 1940, and may be so redated, and shall be marked by the Clerk of said Court as being refiled at an hour after the filing on March 2, 1940, of Appellant's Designation of Contents of Record on Appeal.

The two copies of Reporter's Transcript of Testimony shall by the Clerk be marked as refiled at the same hour and date as Appellant's Designation of Contents of Record on Appeal filed March 2, 1940.

Appellant's Designation of Contents of Record on Appeal originally filed February 15, 1940, may be withdrawn.

Dated: March 2, 1940.

ALEXANDER B. BAKER. [120]
LOUIS B. WHITNEY,
Attorneys for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.
CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant,
703 Heard Building,
Phoenix, Arizona.

[Endorsed]: Filed Mar. 2, 1940. [121]

[Title of District Court and Cause.]

ORDER FOR REFILING DOCUMENTS PURSUANT TO STIPULATION OF COUNSEL

It is hereby ordered that the Statement of Proceedings Had at Trial of Cause, Including Condensed Statement (in Narrative Form) of Testimony Received at Trial, and the Statement by Plaintiff and Appellant of Points Upon Which It Intends to Rely on Appeal, originally filed in this Court and cause on February 15, 1940, shall by the Clerk of this Court be redated as of March 2, 1940, and shall by the Clerk of this Court be refiled as of the same date and hour as Appellant's Designation of Contents of Record on Appeal filed March 2, 1940, and so marked.

It is further ordered that the Defendant's Notice of Testimony Required in Question and Answer Form and Appellee's Designation of Additional Portions of Record on Appeal, originally filed in this Court and cause on February 24, 1940, shall by the Clerk of this Court be redated as of March 2, 1940, and shall by the Clerk of this Court be refiled as of an hour after the filing on March 2, 1940, of Appellant's Designation of Contents of Record on Appeal, and shall be so marked.

It is further ordered that the two copies of Reporter's [122] Transcript of Testimony shall by the Clerk be marked as refiled the same hour and date as Appellant's Designation of Contents of Record on Appeal filed March 2, 1940.

The original Appellant's Designation of Contents of Record on Appeal filed February 15, 1940, may be withdrawn from the files by the plaintiff.

Dated this 2d day of March, 1940.

DAVE W. LING,

Judge.

[Endorsed]: Filed Mar. 2, 1940. [123]

[Title of District Court and Cause.]

STATEMENT OF PROCEEDINGS HAD AT TRIAL OF CAUSE, INCLUDING CONDENSED STATEMENT (IN NARRATIVE FORM) OF TESTIMONY RECEIVED AT TRIAL.

Now comes the above named plaintiff, Southern Pacific Company, and submits herewith the following statement of the proceedings had at the trial of the above entitled cause, including therein a condensed statement, in narrative form, of the testimony received at said trial:

Be it remembered that the above entitled cause came on regularly for trial before the above entitled Court on the 12th day of December, 1939, Honorable Dave W. Ling, United States District Judge, presiding, and sitting without a jury, a trial by a jury having been duly waived by the parties. Plaintiff was represented by its counsel, Messrs. Alexander B. Baker, Louis B. Whitney, Henley C. Booth

and Burton Mason; defendant appeared in person, and was also represented by his counsel, Messrs. Charles L. Strouss and W. E. Polley. Thereupon, the following proceedings, and none other, were taken and had: [124]

Defendant, through his counsel, presented his written motion that the Court amend, in certain particulars, the Court's order on pre-trial conference theretofore entered under date of December 1st, 1939; a copy of which said motion by defendant is included in the record upon appeal in this cause, and is therefore not repeated here.

Defendant's counsel thereupon presented argument in support of said motion, asserting that the original order dated December 1, 1939, was in part erroneous, and in part based upon an inadvertent admission; and plaintiff, through its counsel then and there objected to defendant's said motion, and argued in opposition thereto, asserting that said original order correctly reflected the record upon the pre-trial conference, insofar as it concerned the amendments particularly requested by the defendant, and that said latter amendments were not supported by said record, and could not be allowed upon the ground or excuse of alleged inadvertence, in that some six weeks had passed since the date of the pre-trial conference and before the motion to amend was presented. The Court then and there overruled plaintiff's said objections and made its order granting defendant's said motion.

Plaintiff thereupon offered in evidence, as its Exhibit No. 1, the affidavit of the defendant, dated May 5, 1939, and filed by him with and in support of his original motion to dismiss the complaint herein. Said affidavit was duly received in evidence without objection. A copy thereof is included in the record upon this appeal, and is therefore not repeated here.

Plaintiff thereupon offered in evidence, as Plaintiff's Exhibit No. 2, the notice of taking of the deposition of said defendant; which notice of taking deposition was duly [125] received in evidence without objection. Said notice

PLAINTIFF'S EXHIBIT NO. 2

was and is in words and figures, as follows: (Title of Court and Cause omitted)

"Notice of Taking Deposition.

To: Joe Conway, defendant above named, and Charles L. Strouss, Esq., and W. E. Polley, Esq., his attorneys:

You and each of you please take notice, that the above named plaintiff, Southern Pacific Company, a corporation, by and through its attorneys, Alexander B. Baker, Louis B. Whitney, C. W. Durbrow, Henley C. Booth and Burton Mason, shall, on Wednesday, the 11th day of October, 1939, at the hour of 10:00 o'clock, A. M. of said day, at the office of Baker & Whitney, 703 Luhrs Tower, Phoenix, Maricopa County, Arizona, before Louis L. Billar, a No-

tary Public in and for said county and state, and duly authorized to take depositions and administer oaths within said county and state, take the deposition of said defendant, Joe Conway, whose address is Phoenix, Arizona, as an adverse party, on oral examination.

This deposition shall be taken as the deposition of an adverse party, pursuant to and subject to the provisions of the Rules of Civil Procedure for the District Courts of the United States applicable thereto.

Dated at Phoenix, Arizona, this 29th day of September, 1939.

ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
Solicitors for Plaintiff,
703 Luhrs Tower,
Phoenix, Arizona.
C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
Of Counsel,
65 Market Street,
San Francisco, California.

Service, by receipt of copy of the foregoing Notice of Taking Deposition, acknowledged this 29th day of September, 1939.

CHARLES L. STROUSS,
W. E. POLLEY,
Attorneys for Defendant."

It was then and there stipulated by and between counsel for the parties that the defendant's deposition had been duly taken pursuant to the aforesaid Notice. [126]

Thereupon, plaintiff offered in evidence, and there was received, as

PLAINTIFF'S EXHIBIT NO. 3,

the deposition of defendant, Joe Conway, taken as an adverse party by the plaintiff, pursuant to the provisions of the Federal Rules of Civil Procedure. The testimony of said

JOE CONWAY,

who was called as an adverse party, and was duly sworn prior to the taking of said deposition, as the same appears in said deposition, is here reproduced for the purposes of the record upon this appeal, in condensed narrative form, as follows:

(In response to questions by Mr. Mason):

I am the defendant in the case of Southern Pacific Company versus Conway. I am Attorney General of Arizona, having held that office now for three years. I was first elected in the fall of 1936 and re-elected in 1938. My present term expires about January 1st, 1941. I am a law school graduate and was admitted to the Bar of Arizona in 1924.

I don't know whether there is any legal principle to the effect that where a state undertakes regulation pursuant to its police power, that regulation is presumed to be valid until other-

(Deposition of Joe Conway.)

wise determined by a competent court. I have never heard that such a principle was advocated on behalf of the Attorney General of Arizona in the first Arizona Train Limit case. I refuse to answer whether I have ever said that the Attorney General is charged with the duty of upholding the state laws regardless of their nature. I have read the Arizona Train Limit Law, Section 647 of the Arizona Revised Code, 1928, which has been repeated to me, and I know [127] that that statute contains a specific reference to the Attorney General. I do not know whether there are any other Arizona statutes which impose upon the Attorney General a similar duty of enforcement.

I am represented by counsel in this proceeding and I have said in my answer herein that I have no official funds with which to defend the case. I refuse to answer whether I personally selected Mr. Strouss as my counsel or whether his compensation as my attorney is being paid out of official or personal funds of my own. I also refuse to answer whether Mr. Strouss was selected and furnished to me as counsel without expense to me or to say who selected and employed him for me as my counsel. I further refuse to answer whether Mr. Strouss is being paid for his work in this case by the railway brotherhood organizations in Arizona.

(Deposition of Joe Conway.)

I am following the advice of Mr. Strouss and Mr. Polley very closely in this case and I know that Mr. Strouss was at one time assistant attorney general of Arizona. I have heard that he participated actively in the trial and briefing of the first Arizona Train Limit case.

I do not intend and never have intended to make any differentiation in my enforcement of the laws, as between large and small, rich and poor, or to adopt any prejudice or favoritism in enforcing the laws, as written. I don't recall ever having mentioned in any public statement whether I would or would not enforce any laws on the statute books of Arizona. I have never said that there was any statute that I would not enforce but I have never said that I would enforce an unconstitutional law. I have twice taken the [128] oath of office as Attorney General, declaring in the terms of the oath, as it appears in the Arizona statutes that I will support the Constitution of the United States and the Constitution and Laws of Arizona, and faithfully and impartially discharge the duties of the office of Attorney General according to the best of my ability. That oath calls upon me to carry out the Attorney General's duties; and if the Train Limit Law is constitutional I have no doubt that I must enforce it in the event of violation; but so far there never has been any violation since I have been Attorney General.

(Deposition of Joe Conway.)

I don't recall that I have ever made a statement one way or another on the proposition that, having regard for my oath of office, there was any duty written into a state statute, such as the duty of prosecution for violations, which I would fail to perform. I don't recall that I have ever commented upon the question whether, having regard for my oath of office, there was any state statute which I would refrain from enforcing or refuse to enforce. [129]

* * * * * * *

Q. Now, Mr. Conway, on the day that this suit was filed, which was April 18th, 1939, you went to Governor Jones and asked him for a special appropriation in order to carry on the defense of this case, did you not?

A. No, I didn't ask him for an appropriation.

Q. Isn't it a fact that you told Governor Jones that a special appropriation would be necessary for the Attorney General's office for the purpose of the defense?

A. No, I didn't tell the Governor in so many words that.

Q. And didn't you suggest to the Governor, that in a special session which was then contemplated—that in calling a special session which was then contemplated, the matter of such appropriation should be included in the call?

(Deposition of Joe Conway.)

A. That was—that was more the mission I saw the Governor on. I heard rumors that there might possibly be a special session, and I talked to the Governor about the matter and suggested to him that he include in the call a special appropriation for the Attorney General's office to take care of any of these contingencies which might arise, including this suit which was then filed, [145] or any other matters that might come up.

Q. You particularly mentioned this suit as one for which the money might be required, did you not? A. I believe I did, yes.

Q. And you intended, if the money were appropriated, to use that money to defend the suit, did you not?

A. Well, that was the purpose of asking for it. It was not a question of what might have been done with the money afterwards, but that was the purpose of asking that it be included in the call.

Q. Your purpose then, of course, was to defend the suit on the merits, was it not?

* * * * * * *

The Witness: No, at that time I had not gone into the question of whether or not the Attorney General was involved as the Attorney General, or whether Joe Conway, as a private citizen, was involved. That question I had not worked out in my own mind, but I was not going to take any chances, and as long as there

(Deposition of Joe Conway.)

was a possibility of a special session, like all Attorney Generals, we always like to get a little more money in the coffers so we can hire some additional help.

Mr. Mason: If you did not intend to defend the suit on the merits, Mr. Conway, why was it necessary to make a request or the suggestion at all?

* * * * * * *

The Witness: I didn't know what we might be up against. I first consulted with Mr. Strouss about the defense of [146] the case some time after the complaint was first served upon me.

I have heard of the Nevada Train Limit Case and it is true that I requested the Attorney General of Nevada to send me his records and files in that case. I wanted to obtain the benefit of his experience and the work that he had done. I have never read the Special Master's report or the decision of the three-Judge court in Nevada. In my campaign for re-election in 1938 I did not particularly seek the support of the railway brotherhood members, though their support was welcome to me, just as any support is welcome to any politician. I recognize that there are several thousand votes in the railroad brotherhood group and that they are a very potent factor in certain aspects of certain Arizona elections. I do not recall that in the 1938 campaign, I ever promised or suggested to the railway brotherhood representatives that I

(Deposition of Joe Conway.)

would never threaten to enforce the Train Limit Law. I did not make any such advance or proposition to the brotherhood or any of their delegates, or ask for their support at the convention. I don't recall that I went to that extreme. I know a large number of railroad men and I have talked to them individually and tried to get their support.

I have followed Mr. Strouss' advice in this case pretty closely because I feel that he is competent and capable and I have always held him in high respect. His prior experience in the first Arizona Train Limit case should certainly be an asset in this case. It is a fact that on May 22nd of this year, in the court room, I told [130] the Court and those present that Mr. Strouss, since you have forced me to hire an attorney and I have an attorney hired, would do the talking for me.

I have never discussed with Mr. Strouss the question of whether the Arizona Train Limit Law is constitutional or not because of the fact that there are a number of factors which might enter into the question. There have been many changes since the former suit and since the Nevada case. There are many factors that any attorney is going to take into consideration when he attempts to determine what a possible decision in the Supreme Court or some other court might be. It is probably true that Mr. Strouss has strongly maintained that the Arizona law

(Deposition of Joe Conway.)

is valid and binding upon the plaintiff, as a railroad company in Arizona, in the same manner as any attorney would do when he was on one side of the case, but Mr. Strouss has never expressed his personal opinion to me and I do not know what it is. [131]

* * * * * * *

Q. You recognize, of course, that the full crew law is a law protecting railroad labor, or at least for its benefit?

A. Well, it might be partly on labor and it might be partly on safety. I have always taken more or less the view that the bill was drawn not so much to assist in the labor, but to protect the lives and limbs of those who work in the transportation game.

Q. And would you say the same on the Train Limit Law as you would on the full crew law? A. I would say that, yes.

Q. That it is a law for the protection of the employees?

A. For the protection of their lives and limbs.

Q. Then it is a law protecting railroad labor, isn't it, not in the sense of re-employment of labor, but protecting the employees of the railroad against hazards incident to their employment?

A. It may be. I don't know the purpose of the law. I was not in the Legislature when the bill was passed. Of course, I understand the

(Deposition of Joe Conway.)

contention of the railroad companies is that it is purely a labor increasing bill and the railroad boys, I understand, claim it is a safety device or safety measure.

Q. You have heard or seen some of their arguments to the effect it permits individual safety to the railroad men?

A. I have heard several comments on it.

Q. And you have also heard several of their [147] arguments to the effect that it protects the employment and the men who need employment?

A. I think the railroad boys are very careful not to let that argument get in.

Q. Perhaps, Mr. Conway, you should familiarize yourself with some of the arguments made to the Legislature including Congress, on the advocacy of——

* * * * * * *

Mr. Mason: You recognize from that standpoint; that is, from the standpoint of safety and perhaps the standpoint of continued employment, that it is in the interest of the brotherhoods that the Train Limit Law should remain in effect, don't you?

* * * * * * *

The Witness: Oh, I understand that they are in favor of upholding the law, but most of the arguments I have heard from men in the railroad game is that it is for their personal protection, for their safety.

(Deposition of Joe Conway.)

Mr. Mason: You also recognize, do you not, that they have an interest in having the Train Limit Law remain unchallenged in the courts?

A. Well, I imagine they would have. If I were in the game I would have an interest in it.

Q. And you also recognize their interest in having the law respected and observed and obeyed, do you not?

* * * * * * *

The Witness: What do you mean, "I recognize"?

Mr. Mason: You have said that you viewed the law, that you knew their view to be that the law was one for their protection as individuals? [148]

A. Oh, I didn't say that I know their views; that is, taking the brotherhood as a whole. I have talked to several railroad men about it, discussed the matter pro and con.

Q. You recognize their interest in having the law obeyed and having a train kept at the maximum of seventy cars or fourteen cars, as the case may be?

* * * * * * *

The Witness: I understand they fought here to put the law through and, of course, they put it through and they would like to have it kept on the books if they can.

Mr. Mason: And they would like to have it obeyed as long as it was kept on the books?

* * * * * * *

(Deposition of Joe Conway.)

The Witness: I imagine they would. [149] I have also heard of attempts by the brotherhood to have a national Train Limit Law passed by Congress.

I have no fear that if an actual court test on the Train Limit Law were had on the merits, the law might be set aside as invalid. I have no fear about any law. Those are matters for the courts to decide, not me. If a law is set aside, that is up to the courts. I do not anticipate one way or the other what the decision of a court would be if this law were challenged in court on the merits. At the time this suit was filed I gave an off-hand opinion that I didn't think the law was worth anything, but that was not an official opinion and I had not gone into the merits from the standpoint of safety; I had not read the record in the Nevada case and therefore I wouldn't know what the courts would say. Since the earlier Arizona case, and particularly since I have been Attorney General, no violation of the Train Limit Law has been called to my attention; and I don't intend to pay any attention to that law until something takes [132] place, for the reason that I have not formed or expressed an opinion at any time as to whether the law is valid or not, except the opinion I expressed, and just referred to when I said that personally I thought the law was worthless.

(Deposition of Joe Conway.)

Mr. Mason: You never made any public announcement that you would refrain from the enforcement of it or any private announcement?

A. I never have, and what is more, I never will, but until there is a violation of the law I don't think it is the duty of the Attorney General to go through the statute books and, as you say, there are fifty-two, or fifty some odd different sections in there that the Attorney General should prosecute or should attempt to uphold the laws, but until the occasion arises, we have plenty of other work without looking for it.

Q. Of course, you agree that if the law is violated, why, it will then be and it is right now your official duty to prosecute every violation?

A. Prosecution if it is violated and if it is in violation, but there has never been any violation in the State of Arizona called to my attention and there is still doubt in my mind whether the law is constitutional or unconstitutional, and before I ever take any steps to do anything, I certainly would spend some time to go into the law and determine whether it is or not.

I am not trying to forestall an actual test of the law by court proceedings, through my assertion of ignorance or indifference as to the validity of the law; but I am not looking for

(Deposition of Joe Conway.)

trouble until trouble hits me and until this suit was filed there was no occasion for me to take any action. Although this suit has been on file one week short of five months I have not looked into the law, read the records or reviewed the decisions of the Supreme Court, and other courts. [133]

Q. You told the people in this State in 1938, did you not, in a campaign leaflet, that you had done your work promptly and diligently, fought all comers and would be ready for action in every court in the nation, is that true?

* * * * * * *

The Witness: If it so states in the pamphlet.

Mr. Mason: And then you pledged to the people of Arizona in a letter sent out while you were a candidate for re-election or nomination for re-election, "I pledge to continue giving you and the State a sound and trustworthy administration".

* * * * * * *

The Witness: If it appears in our publicity, we sent it out.

Mr. Mason: You know, do you not, that a statement of that kind went out over your signature with your photograph on the literature?

A. Something to that effect. [150]

* * * * * * *

Mr. Mason: When you said in this campaign statement of 1938 that you pledged to

(Deposition of Joe Conway.)

continue giving you, meaning the voter, and the State, a sound and trustworthy administration, did you mean that you would refrain from enforcing any law of the State or violation thereof called to your attention.

A. I meant just exactly what I said.

Q. Did you perhaps mean that if a violation were called to your attention, you would proceed to prosecute the violator?

* * * * * * *

The Witness: My whole attitude has been that anything pertaining to the laws of the State of Arizona that was constitutional in my opinion and would need attention, to give it attention and we would give it to them just as fast as we could possibly do it, and I think our record shows that we have done it. [151]

Thereupon, upon request of plaintiff, through its counsel, the Court made its order incorporating the transcript of the proceedings at the pre-trial conference into the record of the trial of this cause. Said transcript of proceedings upon pre-trial conference is set forth elsewhere in full in the record upon this appeal and is therefore not repeated here.

Thereupon plaintiff rested its case. Defendant thereupon also rested his case, except that through his counsel he then and there orally renewed his motion to dismiss the complaint, basing said motion upon the following grounds:

(1) Want of jurisdiction because of no evidence that a case or controversy exists, and

(2) The action is against the State of Arizona, and therefore barred by the Eleventh Amendment to the Federal Constitution.

Defendant's counsel thereupon argued orally to the court in support of said motion to dismiss; and plaintiff's [134] counsel argued orally in reply; and the cause was thereupon submitted to the court for its decision.

Dated this 15th day of February, 1940.

Redated this 2nd day of March, 1940. H. S.

ALEXANDER B. BAKER
LOUIS B. WHITNEY
Solicitors for Plaintiff
703 Luhrs Tower
Phoenix, Arizona
C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
Of Counsel
65 Market Street,
San Francisco, California.

Copy of the within received this 15th day of February, 1940.

CHARLES L. STROUSS
W. E. POLLEY
Attorneys for defendant.

[Endorsed]: Filed Feb 15 1940.

[Endorsed]: Redated & Refiled (by order of Court 3/2/40) as of 11.20 a. m. Mar. 2, 1940. [135]

[Title of District Court and Cause.]

STATEMENT BY PLAINTIFF AND APPELLANT OF POINTS UPON WHICH IT INTENDS TO RELY ON APPEAL.

The above named plaintiff and appellant, Southern Pacific Company, a corporation, hereby states that upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore rendered and entered in the above entitled cause, said plaintiff and appellant intends to rely upon the following points:

(1) The trial court erred in granting defendant's motion to amend said trial court's order of December 1, 1939, entered pursuant to pre-trial conference; and in amending its order last mentioned in accordance with defendant's said motion.

(2) The trial court erred in failing to find and conclude, upon the pleadings, the undisputed evidence, and the defendant's admissions, that (1) said defendant admits and agrees that it now is and in future will be his official duty to prosecute for each and every violation of the Arizona Train Limit Law (Revised Code of Arizona, 1928, Section 647) which may occur, and that (2) said defendant has further declared that he never [136] has stated, and never will state, having in mind his official oath of office as Attorney General, that he will refuse to enforce said Train Limit Law, or will refrain from efforts to enforce it.

(3) The trial court erred in failing to find and conclude that, irrespective of defendant's individual beliefs or admissions, as to the unconstitutionality of the said Train Limit Law, it is his official duty as Attorney General to enforce said law according to its terms, until and unless the invalidity of said law be finally determined by a competent tribunal, and that said defendant has never disavowed such duty, or declared that he would refuse to perform or refrain from performing the same.

(4) The trial court erred in finding and concluding that said defendant has not threatened to enforce said Train Limit Law; and erred further in finding and concluding that said defendant has taken no action toward enforcing said Train Limit Law.

(5) The trial court erred in failing to find and conclude that this action for a declaratory judgment is properly and lawfully maintainable against the defendant.

(6) The trial court erred in concluding that no case or controversy, within the judicial power of the United States Courts, is here presented; and in failing to find and conclude that the pleadings, the undisputed evidence, and the admissions of defendant, fully and adequately show that an actual controversy exists in this cause, as between said plaintiff and defendant, of which said trial court had and has lawful jurisdiction.

(7) The trial court erred in making and entering its order of February 9, 1940, directing that this case be dismissed, and in rendering and entering its judgment dated February 14, [137] 1940, in favor of defendant, pursuant to its said order.

(8) The trial court erred in failing to adjudge and decree that no power or duty to enforce said Train Limit Law, or to commence, or conduct, or direct, prosecutions thereunder, in the event of violation, is lawfully vested in or imposed upon defendant, either as Attorney General of Arizona, or otherwise, and in failing to render and enter its declaratory judgment and decree in favor of the plaintiff accordingly.

Dated: February 15, 1940.

Redated: March 2, 1940. H. S.

ALEXANDER B. BAKER
LOUIS B. WHITNEY
Solicitors for Plaintiff
703 Luhrs Tower,
Phoenix, Arizona.

C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
Of Counsel
65 Market Street
San Francisco, California.

Receipt of the within and foregoing acknowledged this 15th day of February, 1940.

CHARLES L. STROUSS
W. E. POLLEY
Attorneys for Defendant.

[Endorsed]: Filed Feb. 15, 1940.

[Endorsed]: Redated and Refiled (by order of Court 3/2/40) as of 11:20 a. m. Mar. 2, 1940. [138]

[Title of District Court and Cause.]

REQUEST FOR ABBREVIATION OF RECORD.

To: Edward S. Scruggs, Clerk of the District Court of the United States for the District of Arizona:

Counsel for defendant have, in the above court and cause, filed "Defendant's Notice of Testimony Required in Question and Answer Form". Included in the portions of the testimony required in question and answer form are certain objections and remarks of counsel, hereinafter set forth, which are not essential to the decision of the questions presented by the appeal, and may be omitted from the record. You are requested to omit from the record on appeal being prepared by you the following parts or portions of the testimony in question and answer form, as shown by the Reporter's Transcript of Testimony on file herein, to-wit:

Lines 15 and 16, page 39 of the Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to the form of that question."

Line 5, page 40, Reporter's Transcript, reading as follows:

"Mr. Strouss: I think he has answered that." [142]

Lines 12 and 13, page 57, Reporter's Transcript, reading as follows:

"Mr. Strouss: I think he has told you that he has not examined into or investigated this."

Line 19, page 57, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 7, page 58, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 20, page 58, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 1, page 59, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that."

Line 25, page 66, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 6, page 67, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Line 13, page 67, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial."

Lines 25 and 26, page 67, and Line 1, page 68, Reporter's Transcript, reading as follows:

"Mr. Strouss: I object to that as immaterial. Make it more definite as to what law the question refers to, and——" [143]

Dated this 5th day of March, 1940.

CHARLES L. STROUSS
W. E. POLLEY
Attorneys for Defendant
703 Heard Building
Phoenix, Arizona
ALEXANDER B. BAKER
LOUIS B. WHITNEY
Attorneys for Plaintiff
703 Luhrs Tower
Phoenix, Arizona.

[Endorsed]: Filed Mar. 5, 1940. [144]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

Now Comes, Southern Pacific Company, a corporation, plaintiff in the above entitled and numbered cause, and pursuant to and in compliance with the provisions of Rule 75 of the Federal Rules of Civil Procedure, hereby designates the following portions of the record, proceedings and evidence to be contained in the record on appeal by said plaintiff to the United States Circuit Court of Appeals in and for the Ninth Circuit, from the judgment heretofore rendered in said cause, namely:

(1) The Complaint.

(2) The defendant's motion to dismiss said complaint.

(3) Defendant's affidavit in support of said motion to dismiss.

(4) Plaintiff's motion to strike defendant's said affidavit in support of said motion to dismiss.

(5) The order of the District Court denying defendant's said motion to dismiss and also denying plaintiff's motion to strike said affidavit.

(6) The defendant's answer to the complaint.

(7) The transcript of the proceedings upon pre-trial conference held November 3, 1939. [152]

(8) The original order of the Court on pre-trial conference, dated and entered December 1, 1939.

(9) Defendant's motion to amend the original order of December 1, 1939 on pre-trial conference

(which motion was presented to the Court on December 12, 1939).

(10) The order of the Court granting defendant's said motion to amend the order on pre-trial conference.

(11) The statement of the proceedings had at the trial of said cause, on December 12, 1939 (omitting the arguments of counsel), including the testimony then and there received, as the same is set forth in the condensed statement of said testimony, in narrative form, which statement is filed herewith and hereby referred to.

(12) The findings of fact and conclusions of law proposed and requested by defendant.

(13) Plaintiff's proposed amendments and additions to "draft of findings of fact and conclusions of law" presented by defendant.

(14) The findings of fact and conclusions of law made and adopted by the Court.

(15) The trial court's order of February 9, 1940, directing that the case be dismissed.

(16) The judgment rendered and entered by the trial court under date of February 14, 1940.

(17) The notice of appeal filed February 15, 1940.

(18) The bond on appeal, filed February 15, 1940.

(19) The notice of appeal filed March 2, 1940.

(20) The bond on appeal filed March 2, 1940.

(21) The statement of plaintiff and appellant of the points upon which it intends to rely on its appeal.

(22) This designation of matters to be contained in the record on appeal. [153]

(23) Each and every minute order rendered and entered by the trial court, other than those heretofore particularly specified.

(24) Stipulation for refiling documents.

(25) Order for refiling documents.

Dated: this 2nd day of March, 1940.

ALEXANDER B. BAKER
LOUIS B. WHITNEY
Solicitors for Plaintiff
703 Luhrs Tower
Phoenix, Arizona
C. W. DURBROW
HENLEY C. BOOTH
BURTON MASON
Of Counsel
65 Market Street
San Francisco, California.

Receipt of copy of the within and foregoing acknowledged this 2nd day of March, 1940.

CHARLES L. STROUSS,
Attorney for Defendant.

[Endorsed]: Filed Mar. 2, 1940. [154]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PORTIONS OF RECORD ON APPEAL.

Now comes Joe Conway, defendant in the above entitled and numbered cause, and pursuant to and in compliance with Rule 75 of the Federal Rules of Civil Procedure hereby designates the following portions of the record, proceedings and evidence, in addition to those portions heretofore designated by the plaintiff, to be contained in the record on appeal by the plaintiff to the United States Circuit Court of Appeals in and for the Ninth Circuit, from the judgment heretofore rendered in said cause, to-wit:

(a) Defendant's Motion to Amend Findings of Fact and Conclusions of Law.

(b) Order of Court on Defendant's Motion to Amend Findings of Fact and Conclusions of Law.

(c) Defendant's Notice of Testimony required in Question and Answer form.

(d) This Designation of Additional Portions of Record on Appeal.

Dated this 23rd day of February, 1940.

Redated this 2nd day of March, 1940. H. S.

CHARLES L. STROUSS
W. E. POLLEY
Attorneys for Defendant
703 Heard Building
Phoenix, Arizona. [155]

[Endorsed]: Filed Feb. 24, 1940.

[Endorsed]: Redated & Refiled (by Order of Court 3/2/40) as of 11:45 a. m. Mar. 2, 1940. [156]

[Title of District Court.]

United States of America
District of Arizona—ss:

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Southern Pacific Company, (a corporation), Plaintiff, versus Joe Conway, Defendant, numbered Civ-31 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 156, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Appellant's Designation of Contents of Record on Appeal, and Appellee's Designation of Additional Portions of Record on Appeal, filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $23.90, and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 14th day of March, 1940.

[Seal] EDWARD W. SCRUGGS,
Clerk

By WM. H. LOVELESS
Chief Deputy Clerk. [157]

[Endorsed]: No. 9474. United States Circuit Court of Appeals for the Ninth Circuit. Southern Pacific Company, a corporation, Appellant, vs. Joe Conway, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed March 16, 1940.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 9474

SOUTHERN PACIFIC COMPANY,
a corporation,

Appellant,

vs.

JOE CONWAY,

Appellee.

STATEMENT BY APPELLANT OF POINTS UPON WHICH IT INTENDS TO RELY UPON APPEAL, WITH DESIGNATION OF PARTS OF RECORD DEEMED NECESSARY FOR PRINTING.

Now comes Southern Pacific Company, a corporation, the above-named appellant, and, in accordance with subdivision 6 of rule 19 of the rules of this Court, hereby states that upon its appeal it intends to rely upon the points specified in the document heretofore filed by said appellant, in the District Court of the United States for the District of Arizona, on March 2, 1940, designated "Statement by Plaintiff and Appellant of Points upon which it Intends to Rely on Appeal", and that it adopts the statement of points appearing in the document last mentioned as the statement of the points upon which it intends to rely upon this appeal.

Pursuant to the aforesaid rule, said appellant hereby designates for printing the entire transcript

of record in this cause heretofore certified by the Clerk of the above-entitled District Court and transmitted by said Clerk to the Clerk of this Court.

Dated: March 19, 1940.

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[Endorsed]: Filed Mar. 21, 1940. Paul P. O'Brien, Clerk.

No. 9474

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit /0

SOUTHERN PACIFIC COMPANY
(a corporation),
Appellant,

vs.

JOE CONWAY,
Appellee.

APPELLANT'S OPENING BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Federal Rules

Codes and Statutes

Texts

No. 9474

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY
(a corporation),
Appellant,

vs.

JOE CONWAY,
Appellee.

APPELLANT'S OPENING BRIEF.

I. JURISDICTIONAL STATEMENT.

This suit was originally brought in the District Court for Arizona, by the filing on April 18, 1939, of a complaint in which plaintiff (appellant)* sought a declaratory judgment as follows: (a) that the Arizona Train-Limit Law (*Arizona Revised Code,* 1928, Section 647) is unconstitutional and void, because in conflict with the Commerce Clause (Art. I, Sec. 8, par. 3) of, and the due-process clause of the Fourteenth Amendment to, the Constitution of the United States; and (b) that the defendant (appellee) who, though sued as an individual, is presently Attorney General of Arizona, has no power or duty to enforce

*The parties are designated in the same manner as in the trial court: i.e., appellant as "plaintiff", appellee as "defendant".

said Train-Limit Law, or to prosecute plaintiff for penalties for its violation.

The District Court had jurisdiction of the parties and the subject matter, under paragraphs 1 and 14 of Section 41, and Section 400, of Title 28 of the United States Code, because: (a) the suit is between citizens of different states, plaintiff being a corporation organized under laws of Kentucky, and a resident of that state, while defendant is a citizen and resident of Arizona (Complaint, par. I; R. 2-3); (b) the value of the matter in controversy, if a controversy exists, greatly exceeds $3000 (Complaint, par. II-b; R. 4); (c) the suit essentially involves the determination of questions arising under the Constitution and laws of the United States (Complaint, par. II-c; R. 4-5); (d) an actual controversy exists, which may be finally determined by a declaratory judgment as prayed for (Complaint, pars. II-c, II-e, XV; R. 4-6, 38-40).

Jurisdiction to render a declaratory judgment is conferred by the Federal Declaratory Judgments Act of 1934, 28 U. S. Code 400 (quoted in the Appendix); and by its complaint (pars. II-a, II-b, Prayer; R. 2-4, 43-44) plaintiff specifically invoked the exercise of that power by the trial court.

Diversity of citizenship, value of the amount in controversy if a controversy exists, and existence of Federal questions, were all admitted, either expressly or by reasonable inference (R. 75-76, 82).

Jurisdiction is conferred upon this Court to entertain and decide the case upon this appeal, by Section 225, Title 28, U. S. Code (the case not falling within

Section 345 of the same Title), in that the District Court rendered its final decree and judgment herein, dated February 14, 1940 (R. 115), dismissing the case for lack of jurisdiction, upon the sole ground that no justiciable case or controversy is presented. The findings of fact and conclusions of law adopted by the trial court (R. 109-114) show that that Court, although of the view that defendant, sued in his individual capacity, was a proper party to this action, and that other necessary jurisdictional facts had been established, reached the conclusion upon the evidence, particularly the admissions of defendant, that the parties were not in controversy as to the constitutionality of the Train-Limit Law, or defendant's duties thereunder.

Notice of appeal from the trial court's judgment was duly filed by the plaintiff within three months from the date of the rendition of the judgment; i. e., on February 15, 1940 (R. 116). A motion to amend the trial court's findings and conclusions having been presented by defendant on February 16, 1940 (R. 118-119), which motion the court denied on February 26, 1940 (R. 119-120), plaintiff again filed its notice of appeal on March 2, 1940 (R. 120).

II. STATEMENT OF THE CASE.

This suit was brought, as heretofore stated, for the purpose of obtaining a judgment declaring that the Arizona Train-Limit Law is invalid and unconstitutional. That statute (quoted in full in the complaint:

par. IV; R. 8-9; and also set out in full in the Appendix hereto) declares it to be unlawful for any railroad company to operate, within the State of Arizona, passenger trains of more than 14 cars, or any trains of more than 70 freight or other cars, exclusive of caboose. Severe and cumulative penalties are imposed, which may range from $100.00 to $1000.00 for each violation. By the express terms of the law the Attorney General is solely charged with the power and duty of conducting or supervising prosecutions for the recovery of such penalties.

The complaint, besides containing the necessary jurisdictional allegations reviewed in the foregoing statement, also alleges, in separate paragraphs, certain essential facts which may be summarized as follows: the detailed facts with respect to plaintiff's interstate railroad operations, as a common carrier both upon its system, and in Arizona (par. III; R. 6-8); the effects of the law upon plaintiff's operations, both generally, and particularly as regards freight-train operations (par. V; R. 9-21); the similar effects upon passenger-train operations (par. VI; R. 21-24); the effect of the law from the safety standpoint, with particular reference to the point that the law is wholly unreasonable as a safety measure, bears no reasonable relation to health and safety, and operates to increase rather than to reduce the hazards of railroad operations (par. VII; R. 25-30); and the essentially interstate, rather than intrastate or local, character of the plaintiff's operations and traffic within and across Arizona which are affected by the law (par. VIII; R. 30-32).

The complaint also alleges that the subject of train limitation is one of national, and not local or state concern (par. IX; R. 32-33); that the law impairs the usefulness of the plaintiff's facilities employed in interstate commerce (par. X; R. 33), and imposes burdens on interstate commerce (par. XI; R. 33); and that it is invalid and unconstitutional, because in violation of the commerce clause (par. XII; R. 34), and the due-process clause of the Fourteenth Amendment (par. XIII; R. 35), and (in so far as it purports or is asserted to be a safety statute) in conflict with, and an infringement on, certain specified federal statutes having to do with the safety of railroad operation (par. XIV; R. 36-38). The complaint further alleges that if it were not for the law, plaintiff could realize numerous benefits, particularly increased efficiency, economy, and safety, in its Arizona operations, by operating trains in excess of the maximum lengths permitted by the law (par. XV; R. 38-40); that because of compliance with the law, plaintiff incurs added and irreparable expense, of at least $300,000.00 per year, which could and would be saved by "long-train" operation, but that the heavy penalties, ranging from $1600.00 per day, at the minimum of $100.00 per violation, during the period of lightest traffic, to $37,000.00 per day, at the maximum of $1000.00 per violation, during the period of heaviest traffic, are such as to prevent plaintiff from undertaking such operations (par. XVI; R. 40-42).

It is also alleged that plaintiff is without adequate remedy at law (par. XVII; R. 42). Each and all of these allegations were, as hereinafter shown, ad-

mitted and conceded by the defendant to be true, and were therefore found by the trial court to be true (Findings of Fact Nos. V, VI, VII; R. 111-114).

An actual controversy was alleged to arise, because of defendant's asserted claims that the law was constitutional and valid, and that the power and duty of enforcement existed and were vested in him (Complaint, par. XV; R. 38-40).

Defendant filed his answer in due course, denying specifically those allegations of the complaint setting forth the existence of jurisdiction, and particularly those stating that a controversy was presented. As to the remainder of the complaint, he adopted in his answer a peculiar and rather equivocal position. The Court's particular attention is invited to paragraph XII of the answer (R. 58-59) which, though addressed only to paragraph V of the complaint, is typical of and exactly similar to several others, each directed to various paragraphs of the complaint.

On November 3, 1939, the parties were called before the trial court for pre-trial conference, as provided by Rule 16 of the Federal Rules of Civil Procedure. At that conference, in response to questions from the court, defendant's counsel announced that defendant admitted each and all of the following paragraphs of the complaint: Nos. I-a, I-b, II-b, III to XIV, inclusive, *XVI* and XVII. Counsel for defendant somewhat qualified his admission of paragraph I-b, however, in that he conceded that the Constitution and statutes of Arizona impose upon him power and duty

to enforce the Train-Limit Law, "in the case of a constitutional law" (R. 75-76).

Defendant, through his counsel, at the same time stated that he denied those portions of the complaint (pars. II-a, II-b, II-c, II-e, and a portion of par. XV) which alleged the existence of an actual controversy of which the trial court had jurisdiction; although he admitted that the value of the matter in controversy, if a controversy exists, exceeds $3000 (R. 82).

On December 1, 1939, the court made its pre-trial order (R. 92-93); which order, except for failure to show defendant's admission of paragraph II-d of the complaint, correctly reflected the proceedings upon the pre-trial conference.

The case came on for trial before the Court, on December 12, 1939. Defendant then presented to the Court his written motion (R. 93-95) to amend the order on pre-trial conference, so as to show (a) that he had denied that part of paragraph I-b of the complaint (R. 3), which alleged that the Constitution and laws of Arizona vested him with power to enforce the Train-Limit Law, and (b) that he had also denied that part of paragraph XVI (R. 41) which alleged that he claimed that it was his duty to enforce the law. Over plaintiff's objection, the trial court (R. 96, 127) permitted the proposed amendment. The first specification of error is addressed to the action thus taken.

The trial then proceeded, plaintiff introducing in evidence: (1) an affidavit filed by defendant on May

5, 1939 (R. 47-49), in support of the motion to dismiss the complaint filed on the same day (said motion was denied on June 24, 1939: R. 52); (2) the notice of the taking of defendant's deposition; and (3) the deposition in its entirety. The substance of defendant's deposition is reproduced in the record, partially in narrative, and partially in question-and-answer form (R. 130-143). Because defendant had admitted each and all of the substantive allegations of the complaint, other than those asserting the existence of an actual controversy, and the Court had announced that evidence in support of such allegations would not be required (R. 93), plaintiff introduced no evidence in support of said allegations; and defendant introduced no evidence at all. Defendant renewed his earlier motion to dismiss for lack of controversy (R. 143-144); and the cause was submitted for decision solely upon that issue (R. 144).

The case was brought to this Court, upon plaintiff's appeal (R. 120) from the judgment, dated February 14, 1940 (R. 115), dismissing the case for lack of jurisdiction. That judgment and order were, as shown by the trial court's findings of fact and conclusions of law (R. 109-114) and, indeed, the very language of the judgment itself (R. 115), predicated entirely upon that court's conclusion that, since the parties had agreed and in effect stipulated upon all of the factual matters establishing that the challenged statute is invalid, and defendant had made no threat and taken no action to enforce the law, no case or controversy is presented within the judicial power of the United States courts.

On May 8, 1940, while this appeal was pending, and shortly prior to the date upon which plaintiff's opening brief was to have been filed, plaintiff presented to this Court its motion that the cause be remanded to the trial court, so as to permit a supplemental complaint to be filed, and evidence presented in support thereof. In connection with its said motion plaintiff showed to this Court that defendant, acting or purporting to act as Attorney General, had on April 19, 1940, brought suit in the Superior Court of the State of Arizona, in the name of the State, against plaintiff as the defendant, accusing plaintiff of having committed two violations of the Train-Limit Law, and seeking to recover the statutory penalties; and also that defendant had on the same day issued a public statement, announcing his belief in the validity of the law and his intention, if successful in the prosecution thus commenced, to sue this plaintiff for penalties with respect to each and every other violation which it might have committed, and specifying that such penalties might aggregate $100,000.00 or more.

On or about May 25, 1940, defendant filed his written reply and "opposition" to plaintiff's said motion, in effect admitting and agreeing that defendant had instituted prosecutions in the state courts as above stated. The fact of such prosecutions, and thus, by necessary inference, of defendant's belief and contention that the power and duty of prosecution exist and are vested in himself, is thus before this Court, as a part of this Court's record in this cause.

Plaintiff's motion to remand was duly argued and submitted to this Court on June 3, 1940; and on June 19, 1940, the Court entered its order denying said motion, "without prejudice to the right to renew such motion at the time the appeal is heard on the merits". In response to that suggestion, plaintiff now renews said motion, urging that the same be further considered, and granted in the event that this Court is not convinced, upon the record before it, that the judgment of the trial court was erroneous and should be reversed.

III. SPECIFICATION OF ERRORS.

1. The trial court erred in amending the order on pre-trial conference, and in failing to be guided by the pre-trial record as made.

2. The trial court erred in failing to find and conclude, upon the undisputed record: that defendant admits and agrees that it now is, and in future will be, his official duty to prosecute each and every violation of the Arizona Train-Limit Law which may occur; and that defendant has declared that he never has stated and never will state, having in mind the official oath of his office as Attorney General, that he will refuse to enforce, or refrain from efforts to enforce said law.

3. The trial court erred in failing to find and conclude that, irrespective of defendant's individual beliefs or admissions as to the validity of said Train-Limit Law, it is his official duty as Attorney General

to enforce said law according to its terms, until and unless the invalidity thereof be finally determined by a competent tribunal; and that said defendant has never disavowed said duty, or declared that he would fail or refuse to perform the same.

4. The trial court erred in finding and concluding that defendant has not threatened to enforce said Train-Limit Law, nor taken any action toward enforcing said law.

5. The trial court erred in concluding that no actual case or controversy, within the judicial power of the United States courts, is presented in this cause.

6. The trial court erred in failing to find and conclude that this action for a declaratory judgment is properly and lawfully maintainable against defendant; and that said defendant, as an individual, is a proper and necessary party to said action.

7. The trial court erred (a) in rendering and entering its judgment of February 14, 1940, in favor of defendant, dismissing plaintiff's complaint and action; and (b) in failing to render and enter its declaratory judgment and decree, in favor of plaintiff, adjudging and declaring that no power or duty to enforce said Train-Limit Law, or to conduct or direct prosecutions thereunder in the event of violation by plaintiff, is lawfully vested in or imposed upon defendant, either as Attorney General of Arizona, or otherwise.

IV. BRIEF OF ARGUMENT.

1. **The record shows that the parties advance and maintain opposing claims as to the powers and duties of defendant with respect to the enforcement of the Arizona Train-Limit Law.**

Defendant has admitted his official duty to prosecute for violations of the Train-Limit Law, and declares that he has never said, and never will say, that he will refrain from or refuse performance of that duty (R. 75-76, 90, 132, 138, 140-141). Plaintiff's claim, as to which there is no question, is that such power and duty of enforcement do not exist.

In the absence of a judicial determination, the duty of enforcement created by the law persists, and should be exercised by defendant as Attorney General, even though as an individual he may consider the law unconstitutional. The law is presumed valid, until its invalidity is judicially determined.

Pennsylvania v. West Virginia (1923), 262 U. S. 553 (592), 67 L. Ed. 1117;

South Carolina v. Barnwell (1938), 303 U. S. 177 (191), 82 L. Ed. 734;

Great Northern Ry. Co. v. Washington (1937), 300 U. S. 154 (160), 81 L. Ed. 573;

Alaska Packers Assn. v. Industrial Accident Commission (1935), 294 U. S. 532, 79 L. Ed. 1044;

Concordia Insurance Co. v. Illinois (1934), 292 U. S. 535 (547), 78 L. Ed. 1411;

A. T. & S. F. Ry. Co. v. State (1928), 33 Ariz. 440, 265 Pac. 602;

Arizona Bank v. Crystal Ice, etc., Co. (1924), 26 Ariz. 205, 224 Pac. 622;

Black & White Co. v. Standard Oil Co. (1923), 25 Ariz. 381, 218 Pac. 139;

Smith v. Mahoney (1921), 22 Ariz. 342, 197 Pac. 704;

Timmons v. Wright (1921), 22 Ariz. 135, 195 Pac. 100;

State v. Anklan (1934), 43 Ariz. 362, 31 P. (2d) 888.

Defendant's opinion of the law's validity, even though rendered in his "official" capacity, is merely advisory, and not a judicial determination.

Austin v. Barrett (1932), 41 Ariz. 138, 16 P. (2d) 12;

Hartford, etc. Co. v. Wainscott (1933), 41 Ariz. 439, 19 P. (2d) 328 (331);

Canadian Northern Ry. Co. v. Eggen (1920), 252 U. S. 553 (562), 64 L. Ed. 713;

United States v. Butler (1936), 297 U. S. 1 (62), 80 L. Ed. 477;

16 *Corpus Juris Sec.* 201-204.

Defendant has never availed himself of the opportunity of avoiding official duty, apparently afforded by the ruling in:

Ex parte LaPrade (1933), 289 U. S. 444, 77 L. Ed. 1311;

indeed, he has consistently and pointedly refused to do so (R. 138-141).

The record of the pre-trial proceedings shows that defendant maintains that the right and duty of prosecution exist (R. 75-76, 90).

The original pre-trial order (R. 92-93) correctly recites the pre-trial proceedings. It was erroneously "corrected" on defendant's motion (R. 93, 95), though without any showing that the pre-trial record was incorrect or any effort to have that record changed. The order as originally made, being accurate, should control, there being no showing that a change thereof was warranted, or necessary to prevent manifest injustice.

Rule 16, Federal Rules of Civil Procedure;
Byers v. Clark (1939), 27 Fed. Supp. 302;
Miles Laboratories v. Seignious (1939), 30 Fed. Supp. 549;
Fancuillo v. B. G. & S. Theatre Corp. (Mass., 1937), 8 N. E. (2d) 174;
Eckstein v. Scoffi (Mass., 1938), 13 N. E. (2d) 436;
Finegan v. Prudential Ins. Co. (Mass., 1938), 14 N. E. (2d) 172.

In fact the original pre-trial order, if allowed to stand, would not have imposed any injustice upon defendant; whereas the modification resulted in substantial prejudice and manifest injustice to plaintiff.

2. The existence of conflicting claims, duly maintained and advanced by parties properly having an interest in the subject matter, is sufficient to constitute a case or controversy warranting the exercise of the powers conferred by the Declaratory Judgments Act, 28 U. S. 400.

The essentials of a "case or controversy" in a declaratory-judgment proceeding are precisely the same as in any other type of case: namely, that there be parties having definite legal interests touching the

subject matter; that they maintain definite adverse claims with relation thereto; and that the circumstances be such that specific relief can be had, through a decree of conclusive character which will dispose of the dispute. Threats of irreparable injury by one party against the other are not essential, if otherwise the parties are definitely opposed.

Aetna Life Ins. Co. v. Haworth (1937), 300 U. S. 227, 81 L. Ed. 617;

Nashville C. & St. L. Ry. Co. v. Wallace (1933), 288 U. S. 249, 77 L. Ed. 730.

The parties here are definitely in opposition to each other, with respect to a subject matter in which both have a legal interest; i. e., the question whether the power and duty of prosecution under the Train-Limit Law legally exist and may be exercised by defendant.

A suit for a declaratory judgment is proper, even though only negative relief is sought: i. e., a declaration that a duty or liability under a statute or patent do not exist, because of invalidity thereof.

Gully v. Interstate Natural Gas Co. (1936), 82 F. (2d) 145;

Edelmann v. Triple-A Specialty Co. (1937), 88 F. (2d) 852, 854;

Bliss v. Cold Metal Process Co. (1939), 102 F. (2d) 105;

Black v. Little, 8 F. Supp. 867;

Maryland Casualty Co. v. Hubbard, 22 F. Supp. 697.

In a recent case this Court affirmed a declaratory judgment of non-liability (i. e., non-infringement of

a patent), finding that an actual controversy existed, even though the defendant by its answer as finally amended had admitted substantially all of the allegations of the complaint.

Caterpillar Tractor Co. v. International Harvester Co. (1939), 106 F. (2d) 769.

A controversy may arise, between a private individual, and a public officer, even though the latter refuses to take any positive action, and adopts a purely negative attitude, if the effect is to perpetuate a restraint or disability challenged as unlawful.

Rochester Telephone Corporation v. United States (1939), 307 U. S. 125, 83 L. Ed. 1147;

Perkins v. Elg (1939), 307 U. S. 325, 83 L. Ed. 1320.

3. **Although defendant is sued herein in his individual capacity and not "as Attorney General", he has an actual interest in the subject matter, and is a proper and necessary party to the present controversy.**

Defendant's power, by virtue of his office and the state statute, sufficiently connects him with the duty of enforcement of the challenged law to render him a proper party, in his individual capacity, to a suit brought to restrain enforcement.

Ex Parte Young (1908), 209 U. S. 123, 52 L. Ed. 714;

Truax v. Raich (1915), 239 U. S. 33, 60 L. Ed. 131;

Terrace v. Thompson (1923), 263 U. S. 197, 68 L. Ed. 255;

Pierce v. Society of Sisters (1925), 268 U. S. 510, 69 L. Ed. 1070;

Old Colony Trust Co. v. Seattle (1926), 271 U. S. 426, 70 L. Ed. 1019;

Missouri Pacific R. Co. v. Norwood (1930), 42 F. (2d) 765;

Municipal Gas Co. v. Public Service Commission (1919), 225 N. Y. 89, 121 N. E. 772.

The requirements of actual controversy are the same, in a suit for a declaratory judgment attacking a state law, as in a suit to enjoin or restrain enforcement; hence defendant is equally a proper party, as an individual, to a declaratory-judgment suit in which a determination is sought that the power and duty of enforcement do not exist.

Municipal Gas Co. v. Public Service Commission, supra;

Aetna Life Ins. Co. v. Haworth, supra;

N. C. & St. L. Ry. Co. v. Wallace, supra;

United States v. West Virginia (1935), 295 U. S. 463, 79 L. Ed. 1546.

In fact, suits for injunctions against state officers have also included or been coupled with suits by the same parties, against the same state officers, seeking declaratory relief.

Gully v. Interstate Natural Gas Co., supra;

Sovereign Camp v. Wilentz (1938), 23 F. Supp. 23.

4. In the event the Court is not persuaded to reverse the decree upon the basis of the record before it, the cause should be remanded for further proceedings, as proposed by plaintiff's motion to remand heretofore filed.

It is proper to remand a cause pending on appeal, for supplementary proceedings in the trial court,

where subsequent events have occurred, not shown in the record, which have material bearing on a proper determination.

Ballard v. Searls (1889), 130 U. S. 50, 32 L. Ed. 846;

Drainage District No. 7 v. Sternberg (1926), 15 F. (2d) 41;

Jensen v. New York Life Ins. Co. (1931), 50 F. (2d) 512;

Simonds v. Norwich Union Indemnity Co. (1934), 73 F. (2d) 412;

Central California Canneries Co. v. Dunkley Co. (1922), 282 Fed. 406;

Levinson v. United States (1929), 32 F. (2d) 449;

Isgrig v. United States (1939), 109 F. (2d) 131.

Supplementary proceedings and proof are proper when they tend to confirm a good cause of action originally *pleaded,* or to justify further relief along the same lines.

Rule 15(d), Federal Rules of Civil Procedure;

Jenkins v. International Bank (1888), 127 U. S. 484, 32 L. Ed. 189;

Texarkana v. Arkansas Gas Co. (1939), 306 U. S. 188, 83 L. Ed. 598;

Napier v. Westerhoff (1907), 153 Fed. 985;

Kryptok Co. v. Haussmann & Co. (1914), 216 Fed. 267;

Insurance Finance Corp. v. Phoenix Securities Corp. (1929), 32 F. (2d) 711;

International Ry. Co. v. Prendergast (1928), 29 F. (2d) 296.

Such a remand for supplementary proceedings is particularly proper where jurisdictional defects of an otherwise good case may thereby be cured.

Parker Washington Co. v. Cramer (1912), 201 Fed. 878;

Chicago, Rock Island & Pacific Ry. Co. v. Stevens (1914), 218 Fed. 535;

Chicago & A. R. Co. v. Allen (1917), 249 Fed. 280;

Ward v. Morrow (1926), 15 F. (2d) 660;

Coppedge v. Clinton (1934), 72 F. (2d) 531.

The supplementary showing proposed by plaintiff is directly material; it establishes that defendant, purporting to act officially, claims that the law is valid and that the power to prosecute exists, and has entertained that view and intention from the beginning. The proposed supplementary showing does not attempt to set up any new cause of action, arising because of defendant's actual prosecution.

Whether the proposed showing is sufficient to sustain the plaintiff's contention is essentially for the trial court to determine; the only question to be considered by this Court is whether it reasonably tends to that end.

Ballard v. Searls, supra;

Jensen v. New York Life Ins. Co., supra;

Central California Canneries Co. v. Dunkley Co., supra.

The supplementary showing does not indicate any lack of an adequate jurisdictional amount; the value of the matter in controversy is not measured by the

amount sought to be recovered in the state suit, but by the value of the right sought to be protected in the instant case.

Healy v. Ratta (1934), 292 U. S. 363, 78 L. Ed. 1248;

Bitterman v. L. & N. R. Co. (1907), 207 U. S. 205, 52 L. Ed. 171;

Glenwood L. & W. Co. v. Mutual Light, etc. Co. (1915), 239 U. S. 121, 60 L. Ed. 174;

Western & Atlantic R. Co. v. Railroad Commission (1923), 261 U. S. 264, 67 L. Ed. 645;

Adam v. New York Trust Co. (1930), 37 F. (2d) 826.

V. ARGUMENT.

FOREWORD.

The essential question presented by this appeal is whether the trial court erred in concluding, from the undisputed facts, that no actual case or controversy is here presented within the scope of the judicial power of the United States courts. While seven separate specifications of error are presented and argued in this brief, in effect they all relate to that single question.

Plaintiff asserts that an actual controversy is shown to be presented here, because:

(1) The record shows that the parties advance and maintain opposing claims as to the powers and duties of defendant with respect to the enforcement of the Arizona Train-Limit Law;

(2) The existence of such conflicting claims, duly maintained and advanced by parties properly having an interest in the subject matter, is sufficient to constitute a case or controversy warranting the exercise of the powers conferred by the Declaratory Judgments Act (28 U. S. Code 400);

(3) Although defendant is sued herein in his individual capacity, and not "as Attorney-General", he has an actual interest in the subject-matter, and is a proper and necessary party to the present controversy.

In the following argument, our specifications of error are presented in three groups, corresponding to the three points just stated. In connection with and as ancillary to the first group, we also argue Specification No. 1, addressed to the trial court's error in disregarding the unchallenged record, and amending the order on pre-trial conference, so as to permit defendant to withdraw and abandon his admission, duly made and recorded at the pre-trial conference, that he claimed and maintained the power and duty of prosecution under the law.

We ask this Court to bear in mind, *first,* that no disputes of fact arise in the case, the only evidence, apart from defendant's admissions of the greater part of the allegations of the complaint, having been defendant's affidavit, and his deposition taken by plaintiff prior to trial; and *second,* that we do not contend that the trial record establishes any controversy between

the parties as to the *abstract* question of the constitutionality of the Train-Limit Law, considered apart from the question of defendant's claimed power and duty of enforcement. The defendant has admitted, and the trial court has therefore found to be true, not only the plaintiff's verified allegations of fact from which may be and are drawn the legal conclusions that the law is invalid for various reasons, but also those paragraphs of the complaint (Nos. XII, XIII and XIV; R. 34-38) in which such invalidity is in precise terms alleged.

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1. THE RECORD SHOWS THAT THE PARTIES ADVANCE AND MAINTAIN OPPOSING CLAIMS AS TO THE POWERS AND DUTIES OF DEFENDANT WITH RESPECT TO THE ENFORCEMENT OF THE ARIZONA TRAIN-LIMIT LAW.

(Specifications of Error Nos. 1, 2, and 3.)

The opposing claims of the parties, as developed by the trial record, are as follows:

Plaintiff claims and asserts that the Train-Limit Law conflicts with the Federal Constitution and is therefore invalid, and that defendant, who occupies the office designated in the Train-Limit Law as clothed with the duty of enforcement, therefore has no power or duty under said law.[1]

Defendant, on the other hand, though admitting both plaintiff's allegations of fact as to the law, and

1. No question arose in the trial court, and none arises in this appeal, as to plaintiff's position. Its claim that the law is invalid (and that the power and duty of enforcement therefore do not exist) is set forth in paragraph XV of the complaint (R. 38-40), as well as in various other paragraphs. A portion of paragraph XV is incorporated in Finding No. 6 of the trial court's findings of fact (R. 113-114).

the conclusions of invalidity predicated thereon, claims and asserts that the power and duty of prosecution nevertheless continue, and declares that he has never said, and never will say, that he will refrain from effort to enforce the law or refuse to enforce it.

In short, the controversy relates, as before stated, not to the question of the constitutionality of the law, but solely to the question whether the defendant *presently* (i. e., in advance of any final judicial determination) has any power or duty of enforcement in the event of violation.

The defendant's position in this regard is shown in various ways: (1) by his admissions and assertions, made in the course of his oral testimony on deposition; (2) by his having taken the oath of office, and thereby stated his intention to fulfil the duties of the office (one of which is the enforcement of the Train-Limit Law, if violated) and particularly by his refusal to disavow the intention and purpose of carrying out such official duty; (3) by the forthright admissions made on his behalf at the pre-trial conference, which were preserved in the original pre-trial order.

During defendant's deposition, after he had admitted that he had twice taken the oath as Attorney General, and thereby declared his intention of discharging the duties of that office faithfully and impartially, he also said (R. 132) that that oath called upon him to carry out the duties of Attorney General; and that he had no doubt, if the Train-Limit Law was constitutional, that he must enforce it in the event of viola-

tion; also stating, however, that no violation had occurred since he had been Attorney General.

Later, in the course of his deposition, the following question and answer appear (R. 141):

> "Q. Of course, you agree that if the law is violated, why, it will then be and it is right now your official duty to prosecute every violation?
>
> "A. Prosecution if it is violated and if it is in violation, but there has never been any violation in the State of Arizona called to my attention and there is still doubt in my mind whether the law is constitutional or unconstitutional, and before I ever take any steps to do anything, I certainly would spend some time to go into the law and determine it is or not."

Although defendant thus expressed doubt as to the validity of the law, he apparently had no doubt at all of his continuing duty to prosecute, if a violation should occur, *prior* to a judicial determination of validity.

It is neither inconsistent nor improper for defendant to admit, or maintain the opinion, that the law is worthless and invalid, and at the same time to claim that in the event of violation he has and must exercise the power and duty of enforcement. Indeed, his statement last above quoted draws a clear and proper distinction between his personal belief and his official duty. It is immaterial whether the Court adopts the view that defendant, as an individual, and because of lack of time, money and inclination to investigate, has

no opinion at all as to the constitutionality of the law (the position indicated by his initial affidavit: R. 47-49; and likewise in his answer: R. 52-70), or whether it believes that the admissions made at the pre-trial conference are actual admissions of unconstitutionality, made after deliberation, and really represent a present and continuing state of mind. Defendant's opinion as an individual, or even as Attorney General, is to be distinguished from the duty which he undertakes in assuming the office and subscribing the oath. That duty (which Joe Conway *alone* can perform) arises from the oath of office, from the statute itself, and from the provisions of the Arizona Constitution and laws prescribing his powers and duties. The language of the Train-Limit Law is mandatory: it declares that the penalties *shall* be recovered, and suits therefor brought, by the Attorney General or under his direction in the name of the State. As the Supreme Court said, in:

> *Pennsylvania v. West Virginia* (1923), 262 U. S. 553 (at p. 592), 67 L. ed. 1117,

in a case involving a somewhat similar statute of West Virginia:

> "It leaves nothing to the discretion of those who are to enforce it. On the contrary, it prescribes a definite rule of conduct and in itself puts the rule in force."

Moreover, there is the general presumption, universally recognized, that a statute duly enacted is valid and constitutional; and this presumption prevails

until invalidity has been determined by final judgment of a competent court.

South Carolina v. Barnwell (1938), 303 U. S. 177 (191), 82 L. ed. 734;

Great Northern Railway Co. v. Washington (1937), 300 U. S. 154 (160), 81 L. ed. 573;

Alaska Packers Assn. v. Industrial Accident Commission (1935), 294 U. S. 532, 79 L. ed. 1044;

Concordia Ins. Co. v. Illinois (1934), 292 U. S. 535 (547), 78 L. ed. 1411.

This principle has been recognized and stated many times by this Court; compare its recent decisions in:

Inter-Island Co. v. Territory (CCA 9th, 1938), 96 Fed. (2d) 412, 419;

Nev. Cal. Electric Securities Co. v. Irrigation District (CCA 9th, 1936), 85 Fed. (2d) 886, 906.

The presumption of constitutionality is recognized by the Supreme Court of Arizona, and therefore binding upon the Attorney General of that State:

A. T. & S. F. Ry. Co. v. State (1928), 33 Ariz. 440, 265 Pac. 602;

Arizona Bank v. Crystal Ice & Cold Storage Co. (1924), 26 Ariz. 205, 224 Pac. 622;

Black & White Co. v. Standard Oil Co. (1923), 25 Ariz. 381, 218 Pac. 139;

Smith v. Mahoney (1921), 22 Ariz. 342, 197 Pac. 704;

Timmons v. Wright (1921), 22 Ariz. 135, 195 Pac. 100;

State v. Anklan (1934), 43 Ariz. 362, 31 P. (2d) 888.

In the *A. T. & S. F. Ry. Co. Case,* which involved the validity of a police-power statute of the State, the Arizona Supreme Court said (265 Pac. 602, at p. 605):

> "The acts of the Legislature within constitutional limits are presumed to be valid and, because its discretion in determining what the interests of the public require and what measures are reasonably necessary to protect them is very large, the courts are reluctant to interfere with its work and will not do so unless it is clear that it has gone beyond the bounds of the fundamental law."

In fact, the mere opinion of defendant, even though rendered by him "as Attorney General", is really nothing more than advisory; and, until and unless a competent court approves and adopts it, has no binding effect upon the State, or the State courts, or any of its officers. In:

Austin v. Barrett (1932), 41 Ariz. 138, 16 P. (2d) 12,

certain county officers, sued for having approved payments without statutory authority, pleaded in defense that such payments had been ruled valid by an opinion rendered by the Attorney General of the State, many years previously, upon which they and other county officers had ever since relied. The Arizona Supreme Court rejected their plea, saying (16 P. (2d), at p. 16) that while there had been no intentional misconduct, in that they had simply followed a custom of long

standing, approved many years previously by an opinion of the Attorney General, nevertheless they must be held liable. In:

Hartford, etc., Co. v. Wainscot (1933), 41 Ariz. 439, 19 P. (2d) 328,

similar reliance by County officials upon the legal opinion of the officers designated by law as their advisors was held to be no defense; the Supreme Court of Arizona saying (19 P. (2d), at p. 331):

> "There is no doubt that under our law the responsibility placed upon boards of supervisors of counties is extremely onerous. Neither good faith on their part nor legal advice by the officers designated by law as their advisors will protect them against liability * * * if it be finally determined that the expenditure involved was not authorized by law (Citing cases). * * * We are satisfied that in this case all of the defendants acted in good faith and under legal advice, but as we have stated that is no defense to the action."

It follows that defendant's opinion, even though officially rendered, does not take the place of a valid final determination by a competent court, nor operate, apparently, to estop defendant or his successor from prosecuting in the event of violation. As defendant himself has expressly recognized (R. 140), and as the courts have universally held, the sole power and duty of rendering an effective opinion which will establish invalidity, and thus prevail against the presumption of constitutionality, resides in the courts alone.

Canadian Northern Ry. Co. v. Eggen (1920), 252 U. S. 553 (562), 64 L. ed. 713;

United States v. Butler (1936), 297 U. S. 1 (62), 80 L. ed. 477;
16 *Corpus Juris Sec.* 201-204, and cases cited.

In the trial court defendant contended, in substance, and presumably will again contend, that his admission of unconstitutionality, in and of itself, and without need for further statement, is equivalent to a declaration that the power and duty of prosecution do not exist; that every semblance of controversy has thus been removed from the case; so that nothing now remains by way of dispute between the parties to which jurisdiction, dependent upon the existence of an actual case or controversy, may be said to attach. We anticipate that in this behalf defendant will rely strongly upon the expressions of the Supreme Court, in its opinion in:

Ex Parte LaPrade (1933), 289 U. S. 444, 77 L. ed. 1311.

Whether the *LaPrade decision* is in any sense an authority in the present case is very doubtful, in view of the circumstances out of which it arose. However, it may be noted that in that case the Supreme Court said (at p. 449):

> "Petitioner *might* hold,[2] as plaintiffs maintain, that the statute is unconstitutional, and that *having regard to his official oath* he rightly may refrain from effort to enforce it." (Emphasis supplied.)

2. "Hold", as here used, is obviously in the sense of "believe"; because only a court could "hold" the law to be invalid. In other words, the word is evidently used in *one* of the many dictionary meanings given to it: "to maintain a position or condition"; and not in the *other* sense: "to decide; lay down the law".

This defendant has never availed himself of the apparent opportunity of disclaiming his official duty which the Supreme Court's language seems to afford. To the contrary, he emphatically declared that he had "never made and never would make" any public or private announcement to that effect. Compare the following excerpts from his deposition (R. 133; 141):

> "I don't recall that I have ever made a statement one way or another on the proposition that, having regard for my oath of office, there was any duty written into a state statute, such as the duty of prosecution for violations, which I would fail to perform. I don't recall that I have ever commented upon the question whether, having regard for my oath of office, there was any state statute which I would refrain from enforcing or refuse to enforce."
>
> * * * * * * *
>
> "Q. (By Mr. Mason): You never made any public announcement that you would refrain from the enforcement of it (The Train-Limit Law) or any private announcement?
>
> "A. I never have, and what is more, I never will; but until there is a violation of the law I don't think it is the duty of the Attorney General to go through the statute books and, as you say, there are fifty-two or fifty some odd different sections in there that the Attorney General should prosecute or should attempt to uphold the laws, but until the occasion arises, we have plenty of other work without looking for it."

These statements should leave no doubt that even though the *LaPrade Case* be construed as presenting

to the Attorney General an avenue of escape from his obligation, as set forth in the statute and undertaken by him when he assumes his office and takes his oath, this defendant, having had the very language of the Supreme Court in the *LaPrade Case* particularly called to his attention, has definitely declared that he has *not* availed himself of that avenue of escape, and intends *never* to do so. In short, he still maintains, as the admissions previously quoted show, that, irrespective of his personal opinion as to the constitutionality of the law, it is and will continue to be his duty to prosecute for every violation of the Train-Limit Law which may occur, until and unless the invalidity of that statute be adjudicated by a competent court and, in consequence thereof, the non-existence of the power and duty of prosecution be finally determined.

We repeat that no inconsistency is presented when an enforcing official, *as an individual,* takes or maintains the position that a law infringes the Constitution, and at the same time announces his belief that it is his duty, under his oath of office, to proceed to enforce it, until or unless the decision of a competent court overcomes the presumption of validity. That attitude is wholly consistent with the constitutional assignment of powers and duties among the legislative, executive and judicial branches. Attorneys General and prosecuting officials of the highest character and attainments traditionally hold the view that until advised to the contrary by a court of competent jurisdiction they will enforce a prohibitory statute as it is

written. Particularly is this true where, as here, the invalidity of the statute does not appear on its face but requires proof of collision with the Commerce Clause and infringement of the Fourteenth Amendment.

Section 9 of Article 6 of the Arizona Constitution provides that the powers and duties of the Attorney General shall be "as prescribed by law"; Section 4396 of the 1928 Revised Statutes of Arizona provides for the issuance of a writ of mandamus to compel the performance of official duties, and Section 52 of the same revised code provides that "the Attorney General shall perform" (certain enumerated duties) and "such other duties as may be required by law". The language of the Supreme Court, in the *LaPrade Case,* that the Attorney General might hold "that the statute is unconstitutional and that having regard to his official oath he rightly may refrain from effort to enforce it", is merely a recognition of the principle that an officer upon whom mandatory duties are cast by a statute may nevertheless, if he believes the statute to be unconstitutional, decline to perform those duties until and unless commanded to do so by a court of competent jurisdiction. Underlying that principle are several considerations: *first,* that an unconstitutional statute is not ordinarily a defense to a suit for damages against the individual who, under color of his office, injures another by enforcement; *second,* that if the statute is eventually, as the official thinks it should be, declared unconstitutional, he may be held liable upon his official bond if he meantime enforces it;

and *third,* that the Legislature cannot effectively command a public official to do an unlawful act. Indeed, special proceedings for a writ of mandamus are in general use to test the validity of statutes; in some cases, where the defendant officer genuinely believes a statute to be unconstitutional, and, in others, where he simulates that belief for the purpose of having a judicial decision as to his duty to obey the statute.

And it may be said in passing that the case at bar, wherein the plaintiff believes that the law is unconstitutional and imposes a daily burden which it cannot escape by violating the law and submitting to prosecution, and the defendant, admitting those allegations to be true, nevertheless says that it is his duty to enforce the law, is closely analogous to a mandamus proceeding. In the instant case, as the pleadings stand, the relief sought is a declaration that it is defendant's duty as an individual to refrain from enforcing the Train-Limit Law under color of his office; while, if this were a mandamus proceeding under Section 4396 of the 1928 Arizona Revised Statutes, which provides for the issuance of a writ of mandamus to compel the performance of official duties, the relief sought would be upon allegations that the law was constitutional, had been violated and that the defendant having refused to prosecute because, in his opinion, the law was unconstitutional, should be compelled to do so because his opinion was erroneous, and was no excuse for non-performance of his statutory duty. In either event, the ultimate issue in controversy would be (as it is here) whether or not the power and duty of enforcement exist.

The proceedings at the pre-trial conference; the trial court's error in failing to give full effect to such proceedings.

At the pre-trial conference, the Court questioned defendant's counsel to determine his attitude toward each paragraph and allegation of the complaint. As to paragraph I, the Court's question and the answer of defendant's counsel were as follows (R. 75-76):

> "THE COURT. Well, then, to go back to the complaint, all of Paragraph 1, apparently, is admitted except, as I stated before, the beginning of line 15 on page 2—— 'As such, under the Constitution and laws of that state, there is vested in him the exclusive power, and upon him is imposed the mandatory duty, to commence and prosecute and to direct the institution and prosecution of, suits for penalties for every violation of the Arizona Train-Limit Law, the statute, the validity of which constitutes the subject-matter of the instant controversy.'
>
> "Now it is true, you admit all of Paragraph 1?
>
> "MR. STROUSS. Yes, we admit that latter part involved, but in the case of a constitutional law."

Each other paragraph of the complaint was then taken up, in its numerical order, until paragraph XVI was reached; and the Court asked the following specific question (R. 90):

> "THE COURT. 16, the whole of 16 is admitted?"

Defendant's counsel replied (R. 90):

> "MR. STROUSS. Is admitted, yes."

As contemplated by Rule 16 of the Federal Rules of Civil Procedure, the Court made its order, dated De-

cember 1, 1939 (R. 92-93), "reciting the action taken at the conference", and showing in particular that paragraphs I and XVI of the complaint had been admitted as true, in common with nearly all the remaining paragraphs. The order concluded with the declaration that at the trial of the case "plaintiff will not be required to offer proof in support of any of the admitted allegations".[3]

Rule 16 provides that an order entered upon pre-trial conference "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice". On December 12, 1939, immediately prior to the commencement of the trial, though without any assertion that the reported record of the pre-trial conference was incorrect or should be changed, or any showing or even assertion the order as made "would result in manifest injustice", and indeed without any prior notice to plaintiff of his intention, other than a letter to plaintiff's attorney, dated December 8, 1939, alleging that the order on pre-trial conference was "in error", defendant presented his motion (R. 93-95) to amend that order so as to show that he had *denied* paragraph I-b of the complaint, and also that portion of paragraph XVI reading as follows (R. 95):

> "Said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said act which it may commit."

3. The Court's order failed to recite that paragraph II-d was admitted, although the record of the pre-trial conference shows that such was the fact. This omission was subsequently corrected by consent.

In support of the motion, defendant through his counsel again asserted that *the Court* had *erred,* and also that the admissions of those allegations, as shown by the pre-trial transcript, were "inadvertent" (R. 127). Plaintiff opposed the motion, particularly in so far as it related to the admission of the above-quoted portion of paragraph XVI; but the Court permitted the amendment.

We assert that this modification was clearly not warranted, either upon the basis of the record before the Court, or as a matter of discretion for the purpose of "preventing manifest injustice". Indeed, the modification resulted in manifest injustice and substantial prejudice to plaintiff, which otherwise would not have occurred.

Defendant's assertion that the original order was erroneous requires only brief consideration. The record shows that defendant admitted all of paragraph I, including the allegation of his statutory and constitutional duty, as Attorney General; the only attempted qualification having been that such power and duty were conferred "in the case of a constitutional law" (R. 76). Obviously, that qualification was not a denial, as apparently argued by defendant in his motion to amend; and although it might have been proper for the Court's pre-trial order to have referred to the qualification, its omission did not warrant substitution of a *denial,* when the paragraph was *in fact admitted.*

The record equally shows that defendant admitted *all* of paragraph XVI, *without qualification.* It cannot be said that defendant or his counsel were trapped

or tricked or misled into this admission, or deprived of full opportunity to review the complaint and weigh the effect of the admission. The transcript shows that the Court's question, and counsel's reply, were deliberate. Clearly then, *on the record,* the original order showing this admission was not erroneous.

We emphasize that defendant, in offering his motion to amend, did not contend that the pre-trial *record* was erroneous, or that the Court's original pre-trial order did not correspond to that record. No such contention could have been maintained. Furthermore, no motion was noticed or made to re-open the pre-trial conference for a further showing by defendant; and the Court's order allowing the amendment did not in any way change the pre-trial record. In short, the amendment was presented to the Court, and approved, *in spite of the record;* and both the amendment and the amending order were wholly without record support.

As we have stated, defendant's counsel asserted that the admission of paragraph XVI, in particular, was "inadvertent" (R. 127); and we anticipate that this argument may be made again, reference being made by defendant to his answer (Par. XXIII, R. 68), in which appears a specific denial of that part of the language in paragraph XVI which, by the amended order, is shown as having been denied (R. 94, 95). Defendant may also refer to the contingent denial of somewhat similar language elsewhere in the complaint, for example in paragraph XV: compare paragraph XXII of his answer (R. 66-67). The prior denial of this particular language, by defendant's *answer,* has no sig-

nificance as showing defendant's position at the time of the pre-trial conference. Other paragraphs of the complaint, or portions thereof, were in the *answer* denied either outright or with qualifications (i. e., lack of information or interest). Yet at the pretrial conference those denials were replaced by unqualified admissions. The defendant's whole attitude at that conference demonstrated an intention to admit every fact alleged in the complaint, so far as he could consistently with the views stated in his deposition.

This is particularly true of the admission of paragraph XVI, as that admission appears in the pre-trial record. While the defendant stated in his deposition that in his private opinion the law was worthless (R. 140), he also agreed that in the event of violation it was and would be his official duty to prosecute (R. 141), and declared further that he never had said and never would say, publicly or privately, that with his official oath in mind, he would refrain from enforcement (R. 133, 141).

We have no doubt that the defendant will argue that the trial court has complete discretion over pre-trial proceedings, and may make such order as it deems proper. It may be conceded that the discretion of *regulating* the *proceedings* does exist; but such discretion must be exercised judicially *and not abused.* Where the record is plain and unchallenged, as in this case: where no action is undertaken to reopen the proceedings or correct the record: where the accuracy of the reporter's transcript, so far as concerns the point in issue, is undisputed: then the entry of an order

which does not correctly reflect the record, and indeed, as here, states the precise opposite, clearly exceeds the bounds of judicial discretion, and the action taken is wholly unwarranted and erroneous.

There are comparatively few decisions in which the effect of pre-trial proceedings upon the subsequent course of a case has been considered.

In:

Byers v. Clark (1939), 27 F. Supp. 302,

the United States District Court for Oregon held that after pre-trial conference held, and order made, counsel for defendant would not be allowed to make a supplemental admission at the trial of the case, the effect of which would be to disrupt the orderly presentation of the plaintiff's case.

If it is improper to permit a supplementary *admission* by a defendant (although plaintiff would perhaps be favored thereby), it is all the more improper to permit a defendant, without notice and in contradiction of the unchallenged record, to withdraw an admission duly made in open court, and substitute therefor a denial.

In:

Miles Laboratories v. Seignious (1939), 30 Fed. Supp. 549,

it was held, in accordance with the provisions of Rule 16, that *admissions made at the pre-trial conference* obviate any necessity of later proof of the matters admitted. This case therefore supports reliance by plaintiff (and by this Court) upon the *record of the pre-*

trial conference, regardless of the subsequent erroneous "correction" of the trial court's initial order entered in response to that record.

Pre-trial practice has prevailed in certain courts of Massachusetts for several years; and recent decisions of the Supreme Court of that State indicate the scope and effect of pre-trial procedure.

In:

Fanciullo v. B. G. & S. Theatre Corp. (Mass., 1937), 8 N. E. (2d) 174,

the Court held that an order made on pre-trial conference was binding, and that the parties were foreclosed from amending, or disavowing a showing made in reliance thereon.

In:

Eckstein v. Scoffi (Mass., 1938), 13 N. E. (2d) 436,

the report and order on pre-trial conference were also treated as binding, and affording a proper basis for the Court's decision.

In:

Finegan v. Prudential Ins. Co. (Mass., 1938), 14 N. E. (2d) 172,

the order made on pre-trial conference was likewise treated as controlling upon the parties in the conduct of the trial.

It will be noted that in each of these Massachusetts cases no question was apparently raised as to whether the pre-trial order correctly reflected the admissions and denials of the parties, at the pre-trial conference.

It is presumed, of course, that the *order* on pre-trial conference will correspond to that *record,* and not (as erroneously "corrected" in the present case) undertake to set forth the precise contrary.

Since there was clearly no error in the original pre-trial order, and it was never asserted that, in the respects here considered, the pre-trial *record* was in the least erroneous, the only basis upon which the modification of the original order may be supported is that it was necessary "to prevent manifest injustice". A brief consideration of the circumstance will, we think, convince this Court that instead of *preventing* manifest injustice, the "correction" *creates* very serious injustice and prejudice to the plaintiff; whereas defendant would suffer no injustice at all, under the original order.

The circumstances to be considered are these: The original order showed that defendant had admitted not only all of the probative facts, but all of the conclusions pleaded by plaintiff, going to show that the Train-Limit Law was invalid and unconstitutional; that he had denied holding any opinion or making any claim that the law was valid, though admitting (Complaint, par. I-b) that the Constitution and laws of Arizona cast upon him the power and duty of enforcement, and (par. XVI) that he claimed, presumably even though not asserting the law's validity, that such power and duty existed. As we have shown, there was no inconsistency in his taking that position. The stage was thus set for entry of a judgment which would fully determine the case; for even though the parties were

in agreement as to the ultimate facts upon which the Court's conclusions were to be predicated, and defendant, in his individual capacity, was shown as holding the view that the law was invalid, nevertheless the parties were in controversy as to the defendant's powers and duties.

In these circumstances, no injustice to defendant could possibly have followed, if a judgment were rendered declaring the law void, and that he had no duty, either individually or officially, to enforce it or take any action thereunder. If defendant were sincere in his private opinion (R. 140) that the law is of no value, then presumably he would welcome a formal judgment wholly relieving him of any apparent statutory duty of prosecution; and such a judgment, since it would respond to stipulated and presumably well-known facts, would represent, not injustice to the defendant, but the only just and equitable solution of the case.

On the other hand, the serious injustice to the plaintiff, following from the modification, is plain and unquestionable. It is apparent that plaintiff relied, as well it might, upon the trial court's order of December 1, 1939, particularly since it was an accurate recital of the pre-trial proceedings, at least in so far as paragraphs I and XVI were concerned; and relied particularly upon the Court's statement (R. 93) that it would not be required to offer proof in support of the allegations thus admitted. At all stages in this case, the only serious question presented has been as to the existence of an actual controversy. With de-

fendant's admission, openly made and properly preserved of record by the trial court's original order, that he claimed and maintained the power and duty of prosecution under the law—a claim which necessarily and vitally affects plaintiff, and which plaintiff of course has consistently opposed—there could be no doubt of an actual controversy. Plaintiff was thus compelled, on the date of the trial, to face the withdrawal of an admission vital to the case, and the necessity of making proof upon a point as to which the Court had announced that none would be required. It could, of course, have requested a postponement, thus suffering further delay, but in view of the continuing irreparable damage (admittedly more than $800.00 per day), and the likelihood of substantial delay, it preferred to proceed.

This Court should conclude that the modification of the pre-trial order operated to plaintiff's grave prejudice; that it was neither warranted on the face of the record, nor under the rule, for the purpose of preventing manifest injustice to defendant; and that the modification should be disregarded, and the cause considered upon this appeal from the standpoint of the actual record made at the pre-trial conference, and the order in response thereto originally entered.

2. THE EXISTENCE OF CONFLICTING CLAIMS, DULY MAINTAINED AND ADVANCED BY PARTIES PROPERLY HAVING AN INTEREST IN THE SUBJECT MATTER, IS SUFFICIENT TO CONSTITUTE A CASE OR CONTROVERSY WARRANTING THE EXERCISE OF THE POWERS CONFERRED BY THE DECLARATORY JUDGMENTS ACT (28 U. S. CODE 400).

(Specifications of Error Nos. 4 and 5.)

The leading decision of the Supreme Court, establishing the requisites of a "case or controversy" in a declaratory-judgment suit, is:

Aetna Life Ins. Co. v. Haworth (1937), 300 U. S. 227, 81 L. ed. 617.

The essential facts of that case, as set forth in the plaintiff's complaint therein, were:

The plaintiff insurance company had issued to the defendant certain policies which provided, among other things, that in the event of total and permanent disability the company would pay defendant a stated monthly income, waive further premium payments, and extend other benefits. Some time after receiving the policies the insured ceased to pay premiums, and claimed the stipulated disability benefits. These claims were presented in ordinary form; but the insured took no further steps, other than to discontinue premium payments. Particularly, no action at law had been instituted by defendant either to obtain the benefits, or to determine the validity of the policies.

The plaintiff had at all times refused to recognize the defendant's claims, insisting on the contrary that the policies had lapsed for nonpayment of premiums, and no longer had substantial value. Because of defendant's claims, and plaintiff's inability to obtain a

determination whether he was in fact disabled, it faced a contingent liability for the payments provided in the policies, and also had to maintain substantial reserves upon the policies; and there was also the danger, if a determination were postponed until the death of the insured, of losing material evidence through disappearance, illness, or death of witnesses.

The District Court granted defendant's motion to dismiss the complaint, holding (11 F. Supp. 1016) that it did not set forth a "controversy" in the constitutional sense, and hence did not come within the scope of the Declaratory Judgments Act. That ruling was affirmed by the Circuit Court of Appeals for the Eighth Circuit, Circuit Judge Woodrough dissenting (84 F. (2d) 695). The Supreme Court reversed the judgment of the Circuit Court, holding that an actual controversy was duly presented.

In reviewing the case, it is desirable to examine first the majority opinion in the Circuit Court, because it sets forth concisely the contentions reviewed and rejected by the Supreme Court; and because, further, it proceeds along the same lines as the argument heretofore made by defendant in the instant case, and cites many of the authorities upon which he has repeatedly relied. The pertinent portions (84 F. (2d) at p. 697) of the Circuit Court's opinion are reproduced in the appendix.

In its opinion, the Supreme Court first discussed the essentials of a controversy; not, however, for the purposes of declaratory-judgment proceedings *only,*

but of *all* adversary proceedings in Federal Courts; and then applied that discussion to the facts of the case before it. We include, in the appendix, excerpts from the Supreme Court's opinion (300 U. S., at pp. 239-241, 242-244).

The close parallel between the instant case and the cited case is readily evident. In that case, as the Court pointed out, the "parties had taken *adverse positions* with respect to their *existing obligations*". So, in this case, the parties take equally "adverse positions" with respect to their existing obligations: plaintiff contending, on the one hand, that it need not comply with the Train-Limit Law, and is not subject to prosecution in the event of violation; while defendant admits that he has taken an official oath which in terms requires him to prosecute for each violation, that he has never said and never will say that he intends to refrain from enforcing the statute in accordance with the terms of his oath, and that it is presently his power and duty, as Attorney General, to prosecute in the event of violation.

The claim that the right and duty of prosecution exist, regardless of defendant's private opinion respecting the law's validity, is, to use the Court's language, "a claim of a present specific" power and duty. The plaintiff's claim that the power and duty do not exist, and that it is immune to prosecution and penalty, is equally definite and specific. Such a dispute is manifestly susceptible of judicial determination; it is precisely the same character of dispute which was presented and determined in the *Nevada Train-Limit*

Case (Southern Pacific Company v. Mashburn, 18 F. Supp. 393) where the principal basis of suit, as shown by paragraph IV of the special findings of the three-judge court, was that the defendant was expressly required by the terms of the Nevada statute to prosecute for violations, and had declared, in the event of violation, that he would carry out that duty.

To continue the parallel with the *Haworth Case:* If defendant had sued[4] to recover the statutory penalties imposed by the Train-Limit Law, there would be no question of the existence of a controversy. If, again, being advised that plaintiff contemplated a settled course of disregard of the law, defendant had brought suit to enjoin such violations, there would likewise be no question of controversy. However, "the character of the controversy and of the issue to be determined is", as the Supreme Court says, "essentially the same" whether presented in the first instance by the plaintiff or the defendant. If judicial power exists to entertain such a suit by the Attorney General, then equally it extends to a suit brought by this plaintiff; and, the other essentials of federal jurisdiction being satisfied, the suit properly lies in a Federal Court. As the Supreme Court emphasizes, "it is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative."

The parallel between the two cases extends still further. In the *Haworth Case* the plaintiff insurance

4. It is now shown and admitted that such a suit has now been brought; see plaintiff's motion to remand, filed in this Court on May 8, 1940; and defendant's opposition thereto, particularly his affidavit included therein as Exhibit A.

company, because of the possible liability in the event of a suit by the insured, and the absence of any determination as to the validity of the latter's claims, was compelled to incur substantial expense, and was apparently without adequate remedy at law for the irreparable loss thus occasioned. In the instant case it is admitted that plaintiff, because of the heavy cumulative penalties provided by the law, and the absence of any final and binding decision determining the law's validity (which decision would, of course, also determine whether the claimed right and duty of prosecution exists), incurs substantial continuing expense, and has no adequate remedy at law for the irreparable loss thus sustained.

Again, in the *Haworth Case* it was strongly argued —indeed, the Circuit Court held—that a controversy was lacking because the defendant was not acting, or threatening to act, in such a way as to invade or affect prejudicially the rights of plaintiff; and somewhat the same argument, though perhaps not in the same language, has been and may again be presented by defendant here. But the Supreme Court held (300 U. S., at p. 241):

> "Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised *although the adjudication of the rights of the litigants may not require the award of process* or the payment of damages. (Citing cases.) And as it is not essential to the exercise of the judicial power that an

injunction be sought, *allegations that irreparable injury is threatened are not required.*" (Emphasis supplied.)

In other words, a justiciable controversy, adequate for judicial determination, may exist, even though specific threats of formal action be lacking. It was therefore wholly unnecessary for the trial court to undertake any finding or determination herein that defendant had not threatened to enforce the law, or taken any action to that end; its Findings Nos. II and III (R. 110) are mere surplusage, and should be stricken.

The decision in the *Haworth Case* is in full accord with the Supreme Court's earlier decision in:

Nashville, Chattanooga, & St. Louis Ry. Co. v. Wallace (1933), 288 U. S. 249, 77 L. ed. 730.

Indeed, the *Wallace decision* is properly regarded as the leading case wherein the Supreme Court indicated that an action for a declaratory judgment may possess the requisites of a case or controversy, within the meaning of the Constitution, and thus properly be carried on in the Federal Courts.

The case was originally brought in a state court, under the State Declaratory Judgments Act of Tennessee, prior to the enactment of the present federal statute. It came to the Supreme Court on appeal from the decision of the highest court of the state. The initial question before the Supreme Court was, of course, whether it had jurisdiction, within the Federal constitutional provision limiting the judicial power to "cases and controversies". After reviewing the com-

plaint, and noting that it sought a declaratory decree that a state tax statute was unconstitutional, the Supreme Court held that an actual controversy, in the constitutional sense, was presented even though declaratory relief only was asked for. Pertinent portions of the opinion (288 U. S., at pp. 261-262) are set forth in the appendix.

Reviewing the facts of the instant case, in the light of the court's opinion, we find, to paraphrase that opinion, that the basic issue here presented (i.e., whether there exists the right and duty of prosecution, as defendant claims) would constitute a case or controversy, if raised and presented in a proceeding brought by plaintiff to enjoin such prosecution if it were threatened, or in the one recently brought by defendant to collect the penalties provided in the challenged law, because of alleged violations. The proceeding as to which a decree is sought is between adverse parties, one of which has been compelled (as the other admits) to yield obedience to the statute because of the heavy cumulative penalties provided therein; whereas the other claims and maintains that it is and will be his power and duty, in the event of violation, to proceed under color of his office to prosecute for each such violation.

To continue the paraphrase further, a valuable legal right (the right to be free of liability for such penalties) asserted by plaintiff, and as to which the adverse position of defendant and his essential interest therein, as the individual solely charged with the power and duty of enforcement, are fully set forth, will be di-

rectly affected and determined by the Court's decision. The question lends itself to judicial determination, and is of the kind which the Federal Courts traditionally decide: for example, the same essential question was presented and entertained in the earlier *Arizona Train-Limit Case (A. T. & S. F. Ry. Co. v. Peterson,* 43 F. (2d) 198; *Same v. LaPrade,* 2 F. Supp. 855); also by the special District Court of three judges for Nevada in the *Nevada Train-Limit Case (S. P. Co. v. Mashburn, Attorney General, supra*); and by the special three-judge District Court for Louisiana in the *Louisiana Train-Limit Suits*[5] *(T. & N. O. Ry. Co., et al. v. Porterie, Attorney-General, et al.,* not officially reported).

Moreover, the relief sought is a definitive adjudication of the disputed constitutional right of plaintiff, in the circumstances shown to be free of the contingent statutory liability. The plaintiff, whose asserted right to disregard the law without liability for penalty will be determined by the decision, is not attempting to secure a mere *abstract* determination of the validity of the statute, or a decision advising what the law would be on an *uncertain* or *hypothetical* state of facts; the determination will rest upon *concrete* facts, fully alleged and admitted; for the complaint specifies, in detail, the continuing burden of expense and interference [redacted] daily and continuously imposed upon plaintiff's operations.

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5. The *Louisiana Case* went no further than an interlocutory injunction against defendants, granted by a special three-judge court in December, 1936, upon affidavits, counter-affidavits and oral arguments.

In his discussion of the *Wallace Case* defendant, in an earlier brief in these proceedings, has asserted that no parallel to the instant case was presented, specifying three reasons, as follows:

(a) While the *Wallace Case* was a suit for declaratory judgment, it was under the Tennessee law, and not the federal statute;

(b) In that case the defendants "had demanded payment of the tax in a specified amount and * * * determined to enforce their demand"; while here there have been no acts or threats by defendant, either individually or officially; even the allegation that he claims and maintains that the law is valid being (so it is said) merely an erroneous assumption; and

(c) There the action was against the defendants in their official capacity, while here it is against Mr. Conway "as an individual"; in other words, in that case there actually existed an interest on the part of defendants, together with a legal relation with the plaintiff; whereas no such interest or relation exists in the instant case.

So far as defendant's point (a) is concerned, it is seen to be wholly without merit, when the essential nature of the question first considered and decided by the Supreme Court is examined. That question was whether a case or controversy was presented, within the meaning of Article III, Section 2, of the Federal Constitution. Whether the case originates in a State or a Federal Court, the Supreme Court's jurisdiction is circumscribed by the constitutional limitation, in the

same way and to the same degree as all other federal courts. Therefore, in defining a "controversy", to determine whether its own jurisdiction could be invoked, the Supreme Court was recording such definition, for similar purposes, for all other courts of the United States whose judicial powers rest upon Article III of the Constitution. The case is therefore squarely in point in its interpretation of the term "controversy", for purposes of federal-court jurisdiction.

In fact, it is fully apparent that this decision (rendered in February, 1933), which established that Federal Courts could exercise jurisdiction in cases where *declaratory,* rather than *coercive,* relief was sought, led to the enactment, at the next regular session of Congress (June 14, 1934), of the Federal Declaratory Judgments Act.

Defendant's point (b) is likewise without merit, and presents no essential distinction. The defendants in the *Wallace Case* had, as the opinion shows, demanded payment and determined to enforce their demand. In this case, it is quite true that prior to April 19, 1940, no actual demand had been made by defendant; but none was necessary, for the powerful effect of the penalty provisions of the challenged law had for years proved to be sufficiently persuasive to compel compliance. Defendant so conceded, when he admitted plaintiff's allegations (Complaint, pars. II-d, XV, XVI; R. 5, 39, 42) that it sustains continuing irreparable damage because of the law, but is unable and unwilling to disregard its provisions because of the enormous penalties to which it might be subject. There has never

been, moreover, any question of defendant's determination to enforce the demand embodied in the challenged law; he has admitted the existence of the power and duty of prosecution in the event of violation, and declared that he never has said, and never will say, as a means of avoiding that duty, that having regard for his official oath he intends to refrain from attempts at enforcement (R. 133, 141).

The distinction attempted in defendant's point (c) is likewise without significance. It is predicated upon his position that since he is sued "as an individual", he cannot be a party to a controversy concerning the subject matter of this suit, because as an individual he claims to have no substantial interest therein. This contention is discussed at greater length in the next succeeding subdivision of this brief; it will suffice here to point out that defendant, although sued "as an individual", is identified as the present Attorney General of Arizona, admittedly the individual who now occupies that office (R. 53), and the *only* individual upon whom is laid responsibility for enforcement of the challenged law; and consequently the *only* individual who, acting under color of that office, can effectively assert the existence of the power and duty of enforcement. As we show more fully hereafter, defendant's position is not to be distinguished from that of any other occupant of a state office who, as the individual charged with the duty of enforcing a state statute, has been made defendant in a federal proceeding brought to determine whether, under the Federal Constitution, such duty existed. Such a state official is necessarily

sued in the Federal Court *as an individual,* unless the state's consent to suit be given; yet there has never been any doubt, at least since the Supreme Court's decision in *Ex Parte Young* (1908), 209 U. S. 123, 52 L. ed. 714, that in that individual capacity he is a proper and necessary party to the controversy.

In a number of recent Federal cases, it has been held, just as in the *Haworth Case,* that an actual controversy may exist, warranting the exercise of jurisdiction to grant declaratory relief, even though there has been no overt threat by the defendant, or anything more than a statement of a claim adverse to that of the plaintiff.

Compare:

Gully v. Interstate Natural Gas Co. (1936), 82 F. (2d) 145 (149) (cited with approval by the Supreme Court in the *Haworth Case,* 300 U. S., at p. 244);

Edelmann v. Triple-A Specialty Co. (C.C.A., 7th, 1937), 88 F. (2d) 852 (854);

Bliss v. Cold Metal Process Co.[6] (C.C.A., 6th, 1939), 102 F. (2d) 105 (108);

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6. This decision is likewise particularly pertinent because, besides indicating that a controversy exists where there are conflicting claims of the parties as to the validity of an instrument (in this case a patent), it also declares that any doubt of the existence of a controversy in the case had been removed, by the filing of a suit, by the patentee, against the alleged infringer, such suit having been commenced after the declaratory judgment proceeding was started. The Court said (p. 108):

> "Since the filing of the bill it (defendant) has brought suit for infringement against the plaintiff itself. All doubts as to the existence of a present controversy are now dispelled."

The defendant in the instant case, who is in the same position as the claimant under a patent, because he claims the right and power to prosecute against infringement of the statute which purportedly confers certain powers and obligations upon him, has now (April 19, 1940) actually filed suit against this plaintiff for alleged infringements of the statute. "All doubts as to the existence of a present controversy are now dispelled."

Black v. Little (1934), 8 F. Supp. 867 (870);
Maryland Casualty Co. v. Hubbard (1938), 22 F. Supp. 697, (699-700, 702).

In the appendix hereto we include excerpts from the opinions rendered in these cases.

We ask the Court to note especially that in the *Haworth Case,* as in other cases of which the last three cited are typical, the Court sustained the propriety of a so-called "negative" declaration: i e., that an asserted obligation or liability did not exist. Such is precisely the relief sought here: a declaration, in effect, that defendant does *not* possess the power or duty of prosecution, and hence that plaintiff is *not* obligated to obey the challenged law, nor liable for penalties in the event of disobedience.

The authorities likewise establish the propriety of proceeding in the Federal Courts for a declaratory judgment, where the existence of powers dependent upon validity of a statute or ordinance is challenged on constitutional or other grounds. Indeed, the essential value of the declaratory proceeding is that the disputed question can be settled in advance of either violation, or the taking of definitive steps to compel compliance. Compare the *Gully, Black* and *Edelmann Cases,* supra; and also:

Wallace v. Currin (1938), 95 F. (2d) 856, 861;
In re N. Y., N. H. & H. R. Co. (1936), 16 F. Supp. 504, 505;
Sovereign Camp v. Wilentz (1938), 23 F. Supp. 23, 29;
Acme Finance Co. v. Huse (Wash. S. Ct. 1937), 73 Pac. (2d) 341, 77 Pac. (2d) 595, 114 A. L. R. 1345;

Tuscaloosa County v. Shamblin (Ala. S. Ct. 1936), 169 So. 234;

Milwaukee Gas Specialty Co. v. Mercoid Corp. (C. C. A., 7th, 1939), 104 F. (2d) 589, 591;

Fosgate Co. v. Kirkland (1937), 19 F. Supp. 152, 158.

The *Acme Finance Case* is of particular interest, in that the Supreme Court of Washington, after a discussion of the Uniform Declaratory Judgment Act (adopted in Washington), and the decisions in the *Wallace* and *Haworth Cases,* supra, entertained an action for a declaratory judgment to determine the constitutionality of a statute which, though enacted, was not to become effective until nearly a month after the case was begun. No steps had been taken by defendants, the enforcing officers, to compel compliance with the law. It was simply alleged (in the complaint) and admitted (by demurrer), that defendants intended to begin enforcement upon the effective date. The Court said:

> "The plaintiff and interveners were in this dilemma: If, on the one hand, they complied with the act on June 9th, and the act was in fact unconstitutional, they would do so to their damage. If, on the other hand, they refused to comply with the law, and they were wrong in thinking it unconstitutional, they would suffer the criminal penalties provided in the act. Either course was fraught with danger. To afford relief to parties in such a situation is the very purpose of the Declaratory Judgment Act.
>
> "The material consideration is that the case, as made, answered all the requirements of a jus-

> ticiable controversy. The plaintiff and interveners alleged that the defendant would enforce the law on and after June 9th, claimed that it was unconstitutional, and that they would therefore suffer legal damage. The defendant admitted that he would enforce the law as being constitutional on and after June 9th. Here was an interested plaintiff and an interested defendant, and they were in sharp controversy. The trial court was, therefore, compelled to take jurisdiction and render judgment."

The reasoning of the case is in line with the views of the Supreme Court, which held that an action to enjoin enforcement of an alleged unconstitutional statute was not prematurely brought, even though the statute by its very terms was not to become effective for a considerable period after the suit was commenced:

> *Pierce, Governor, et al. v. Society of Sisters* (1925), 268 U. S. 510, 535, 69 L. ed. 1070.

The situation in the instant case is closely analogous to that presented in a very recent case in this Court:

> *Caterpillar Tractor Co. v. International Harvester Co.* (Oct. 4, 1939), 106 F. (2d) 769.

The plaintiff, a manufacturer of tractors, had received from defendant a letter stating in substance that defendant had examined certain of the types of tractors recently brought out by plaintiff, and that they infringed defendant's patents. The letter declared defendant's purpose to insist upon recognition and enforcement of its rights, and requested that

manufacture of the infringing models be discontinued, and an accounting made for past use. The plaintiff thereupon brought suit for a declaratory decree of non-infringement. An actual controversy was alleged to exist because of defendant's asserted opposing claims, as set forth in its letter.

Defendant initially filed an answer denying the validity of the plaintiff's patents and asserting that its own were valid; but later, on the eve of the trial, it reversed its position and filed an amended answer admitting that no infringements existed as previously claimed. (Defendant in the instant case followed practically the same course). Upon motion of plaintiff, the lower court granted summary judgment, and rendered a declaratory decree of non-infringement accordingly. Upon this appeal the defendant raised two points, first, that the complaint did not set forth facts sufficient to show the existence of an actual controversy and, second, that the summary judgment was not proper in the circumstances.

This Court held, as to the first point, that the complaint, in that it set forth the actual opposing claims of the parties, "properly alleges a controversy to serve as a basis of jurisdiction of the Court, in this action for a declaratory judgment".

As to the second point, the Court held that, in view of the admissions of non-infringement in the defendant's supplemental answer, the declaratory decree was properly rendered, except as to one model as to which some question of fact actually existed.

The close similarity to the instant case is at once apparent. In the cited case, there was no actual prosecution by defendant, nor immediate threat thereof, nor anything more than an *assertion of a purpose* to insist upon recognition and enforcement of alleged rights. Certainly defendant in the instant case, even prior to his commencement on April 19, 1940, of the prosecution in the State Court, presented at least as vigorous, if not a stronger claim; for he asserted that the power and duty of prosecution were vested in him, and declared that he had never said, and never would say, that he intended to refrain. Furthermore, even though by its admissions of non-infringement the defendant in the cited case withdrew the questions "of fact" relating to its controversy with the plaintiff, so far as concerned the alleged infringement, the "actual controversy" was not abated. The declaratory decree was held proper as a determination of the dispute; and, except as to one minor detail, was affirmed. The case amply sustains our contention that defendant's admissions are not to be taken as abating the controversy; that plaintiff is instead entitled to a declaratory decree, which may be based upon defendant's admissions of fact, and is necessary to dispose of and determine the claim that the power and duty of prosecution exist under the challenged law.

Other recent federal cases in which a declaratory decree has been held proper, in order to settle the rights of one party to continue the manufacture and sale of a particular article, as against a claim of in-

fringement by a rival party, and even in the absence of a threat of prosecution or other action by the latter, include the following:

Zenie Bros. v. Miskend (1935), 10 F. Supp. 779;[7]

Interstate Cotton Oil Refining Co. v. Refining, Inc. (1938), 22 F. Supp. 678;

Booth Fisheries Corporation v. General Foods Corporation (1939), 27 F. Supp. 268;

Ladenson v. Overspred Stoker Co. (C.C.A., 7th, 1937), 89 F. (2d) 242.

The Court will, we think, recognize the close analogy between the instant case, and one involving alleged infringement of a patent, especially where the alleged or potential infringer brings the suit. A patent is in effect a charter to the patentee, conferring a more or less exclusive right which, under well-recognized principles, he may enforce by suit against an infringer, actual or threatened. The Train-Limit Law is likewise in effect a "charter" conferring (so far as the State may do so) exclusive powers and duties upon the Attorney General, which he may and must assert by suit against an infringer. But, just as one whose rights are affected by another's patent may (in *advance* of infringement) sue the patentee to determine whether the patent be valid, so may plaintiff, whose rights are affected by the "charter" under which defendant is empowered to prosecute, bring suit in advance of infringement (as it has done), to determine whether defendant's "charter" is valid.

7. In the Appendix we include a quotation from the opinion (10 F. Supp., p. 781).

Thus far we have discussed the question whether a controversy is here presented, from the standpoint of the defendant's admission and claim that he is vested with the power and duty of enforcement. But we maintain that even though defendant's attitude be viewed as merely negative, the admissions and claims just mentioned being disregarded for purposes of the argument, a justiciable controversy is still presented by the unchallenged facts. Two recent (1939) decisions of the Supreme Court sustain our position:

Rochester Telephone Corporation v. U. S. (1939), 307 U. S. 125, 83 L. ed. 1147;

Perkins v. Elg (1939), 307 U. S. 325, 83 L. ed. 1320.

In the *Rochester Case* the Court re-examined the well known rule of decision, initially established in *Procter & Gamble v. United States* (1912), 225 U. S. 282, and subsequently followed in many other cases, that when one has made complaint before a regulatory tribunal (such as the Interstate Commerce Commission), which after investigation has dismissed the complaint, denying relief, the complainant cannot maintain suit, as would otherwise be his right under federal law, to review such so-called "negative" action.

In the opinion in the *Rochester Case* the Court, after reviewing various types of proceedings before the Interstate Commerce Commission (selected as typical of federal administrative tribunals), and referring particularly to the necessity that a court proceeding to review a decision of the Commission must satisfy the constitutional requirements of a "case or

controversy", discussed the *Procter & Gamble Case* in some detail (307 U. S., at pp. 135-143). It said, in part (at p. 136):

> "Clearly Procter & Gamble was authorized under Section 13 of the Act to Regulate Commerce to institute the proceedings before the Commission. Since it asserted a legal right under that Act to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication—constituting a case or controversy—were present. Compare *Interstate Commerce Comm'n v. Brimson, supra; Interstate Commerce Comm'n v. Baird,* 194 U. S. 25, 38. Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles."

The Court then concluded that the distinction earlier drawn between "negative" (and hence non-reviewable), and "affirmative" (and therefore reviewable) action of the Commission was improper, and should no longer be observed, saying (at p. 142):

> "The concept of 'negative orders' has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them. An action before the Interstate Commerce Commission is akin to an

> inclusive equity suit in which all relevant claims are adjusted. An order of the Commission dismissing a complaint on the merits and maintaining the *status quo* is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction."

The essential result, in so far as concerns our immediate argument, is that the Court held that a justiciable controversy may exist between one affected by a statutory restriction, and another who, by virtue or color of his position as a public officer, has power or duty to take action under that statute, even though the latter has failed or refused to act; if the result of such non-action is to leave the affected party in its previous position of alleged disadvantage.

So, in the instant case, assuming that defendant desired to prevent plaintiff from obtaining a Federal Court adjudication of the validity of the Train-Limit Law, and in furtherance of that purpose announced, when confronted with plaintiff's complaint, that he

had not formed and would not undertake to form any opinion, or make any claim, respecting the law's validity, or the existence of any power or duty of his own as Attorney General: Could it be said that plaintiff, thus facing daily a continuing irreparable expense, which defendant's assumed conduct would be designed to perpetuate, was without any remedy other than the expedient of violation in order to provoke a possible prosecution? The *Rochester Case* provides the answer: It indicates that, just as a complainant who, being left in his prior position through non-action of a Commission, may maintain suit against that Commission to determine whether, as a matter of law, affirmative action or non-action is proper; so plaintiff herein, in the circumstances assumed, would still be entitled to maintain its suit against defendant, if thereby a determination could be had whether its unwilling observance of the restrictions should continue.

In the *Perkins Case* the essential question was whether respondent, a native of the United States, was entitled to a declaratory judgment against the Secretary of State and the Secretary of Labor, establishing her American citizenship, her right to be free of interference by the Department of Labor, and her further right to have issued to her an American passport. The lower court held (99 F. (2d) 408) that an actual controversy existed, as between respondent and the Secretary of Labor, because of respondent's claim of citizenship, and the opposing claim of alien status advanced by that defendant; but dismissed the complaint against the Secretary of

State, holding that, since the latter had discretion to issue a passport, his non-action or refusal to act could not be controlled by declaratory judgment. The Supreme Court affirmed the decree, as against the Secretary of Labor, but held that it should be modified to include also the Secretary of State; saying (307 U. S., at p. 394):

> "The cross petition of Miss Elg, upon which certiorari was granted in No. 455, is addressed to the part of the decree below which dismissed the bill of complaint as against the Secretary of State. The dismissal was upon the ground that the court would not undertake by mandamus to compel the issuance of a passport or control by means of a declaratory judgment the discretion of the Secretary of State. But the Secretary of State, according to the allegation of the bill of complaint, had refused to issue a passport to Miss Elg 'solely on the ground that she had lost her native born American citizenship.' The court below, properly recognizing the existence of an actual controversy with the defendants (*Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227), declared Miss Elg 'to be a natural born citizen of the United States' and we think that the decree should include the Secretary of State as well as the other defendants. The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship."

The decision thus squarely sustains our position that even though the matter of action or non-action by

an occupant of a public office may be subject to discretion, nevertheless if the result of non-action is to prejudice rights asserted by a private litigant, a controversy exists within the jurisdiction of the federal courts, which may be settled by a declaratory judgment. So, in the instant case, even if it were conceded that defendant could insist that he has discretion to determine whether or not he will act—i. e., state his position with respect to the validity of the law and his duties thereunder—and even further that he has exercised that discretion by declining to state his opinion, or asserting that he has none: even then, since his non-action would be intended to be, and clearly would be, highly prejudicial and damaging to plaintiff, an actual controversy would arise; and plaintiff would be entitled to a declaratory judgment whether defendant's non-action was warranted, thus necessarily determining whether the law was valid and the duty of enforcement existed.

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3. **ALTHOUGH DEFENDANT IS SUED HEREIN IN HIS INDIVIDUAL CAPACITY, AND NOT "AS ATTORNEY GENERAL", HE HAS AN ACTUAL INTEREST IN THE SUBJECT MATTER, AND IS A PROPER AND NECESSARY PARTY TO THE PRESENT CONTROVERSY.**

(Specification of Error No. 6.)

At various stages of this case in the District Court, defendant laid great stress upon the point that, since he was sued *in his individual capacity,* and not "as Attorney General", he had no legal interest in the subject matter, and therefore could not be a party to

an actual controversy with the plaintiff with respect to either the constitutionality of the Train-Limit Law, or any possible powers and duties of the Attorney General thereunder. In his opposition to plaintiff's motion to remand, the point was again strongly emphasized: Compare defendant's memorandum, at pages 9-15.

From the very first, e. g., when the motion to dismiss was filed in the District Court (R. 46), it was clear that defendant's point was wholly without merit; and in denying the motion to dismiss the District Court properly so held (R. 52). When the essential facts were more fully developed, and it was shown and admitted that defendant claimed that the official power and duty of prosecution exist, and had never stated any intention to refrain from or abandon that official duty, having in mind his oath of office, the entire basis of the argument was swept away.

This discussion is therefore not addressed to any erroneous ruling of the trial court that defendant is not and cannot be, *as an individual,* a proper party to a controversy with respect to the subject matter; for no such ruling was made. On the contrary, the trial court refused a proposed finding to that effect (Defendant's Proposed Finding No. 2; R. 97-98) tendered by defendant. Rather, we suggest that the trial court erred in failing to include an express finding that defendant has a legal interest, and is a proper and necessary party; although its Findings Nos. I and III (R. 110), which show that defendant, sued as an individual, is the Attorney General, who alone is

empowered and required to enforce the Train-Limit Law, may have been thought by the court to be adequate.

We have no doubt that defendant will renew his contention upon this appeal; and it may be expected that he will again cite the various authorities heretofore relied upon to establish the proposition that it must appear, as a prime essential to a controversy, that there are before the Court opposing parties who have an actual "legal" interest in the subject matter. Just how the contention can still be attempted, in view of the recent prosecution commenced by defendant, is a problem which will, we think, challenge the ingenuity of opposing counsel.

As we understand defendant's point, it may be stated as follows: he is sued here "as an individual"; as such "individual" he is not to be distinguished from any other citizen of Arizona; in his individual capacity he has and can have no more interest in the validity of the Train-Limit Law than any other of his fellow citizens; that (individual) interest is so remote and intangible, at best, as to be of no moment at all; "as an individual", he has no duties to perform in connection with the law or its enforcement, and is not and cannot be affected by or interested in the determination of its validity; a controversy is therefore impossible, because of the entire lack of any party, opposed to plaintiff, who has a real interest in the subject matter.

When defendant is confronted with the fact that he is, nevertheless, the Attorney General, upon whom is

laid by statute the sole duty of enforcing the challenged law; and that, acting or purporting to act in that capacity, he has prosecuted plaintiff in the State Court, defendant replies that the duty of enforcement is imposed upon him *in his official capacity,* not as an individual, and that the prosecution has been undertaken in that (official) capacity; whereas he has been and is sued, *not* "officially" or "as Attorney General", but *as an individual only.*

In short, defendant says that by suing him "as an individual", plaintiff has excluded from the case all consideration of any possible interest which he may have by reason of his "official" status; furthermore, that consideration of his official status is foreclosed, because a suit against him "as an official" would be barred by the Eleventh Amendment, as a suit against the State.

Defendant's argument would be much more persuasive if it were not so squarely opposed to the principles established by a long line of decisions of the Supreme Court; the leading case being:

Ex parte Young (1908), 209 U. S. 123, 52 L. Ed. 714.

Mr. Young, the petitioner in the Supreme Court, was at the time Attorney General of Minnesota. He had been named as defendant in a suit in a United States Circuit Court (then the court of first instance) seeking to enjoin him and certain co-defendants from enforcing a state statute challenged as unconstitutional. The Circuit Court issued a temporary injunction, despite Mr. Young's objection that he could not

be sued "as Attorney General" based on the Eleventh Amendment. Mr. Young disregarded the injunction, and was thereupon adjudged in contempt. He then petitioned the Supreme Court for writs of review and habeas corpus to obtain his discharge.

The Supreme Court, in a lengthy opinion, held that Mr. Young was not suable as an officer of the state (i. e., in his "official" capacity), because of the Eleventh Amendment; but said that the suit to enjoin enforcement of the alleged unconstitutional statute was not against the state, but *against the individual* who, under color of the office, was seeking or attempting to perform an unconstitutional act; that his occupancy of the office upon which the state had by law conferred the power and duty of prosecution under the challenged statute was sufficient to connect him with its enforcement, so as to render him a proper, if not a necessary, party to the suit. Pertinent portions of the opinion are set forth in the appendix.

In

Truax et al. v. Raich (1915), 239 U. S. 33, 60 L. Ed. 131,

suit was brought against "Wiley E. Jones, Attorney General of Arizona", and "W. G. Gilmore, County Attorney of Cochise County, Arizona", as well as against Truax, seeking to enjoin enforcement of an alleged unconstitutional law. One of the particular questions raised by defendants' motion to dismiss was whether the suit was properly brought against the Attorney General and the County Attorney. The Supreme Court said (239 U. S., at p. 37):

"As the bill is framed upon the theory that the act is unconstitutional, and that defendants, who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state. Whatever doubt existed in this class of cases was removed by the decision in Ex Parte Young, 209 U. S. 123, * * * which has repeatedly been followed."

In:

Terrace v. Thompson (1923), 263 U. S. 197, 68 L. Ed. 255,

suit was brought by private individuals against "Lindsay L. Thompson, Attorney General of the State of Washington", to enjoin the threatened enforcement of a state statute on the ground of unconstitutionality. The Court said (263 U. S., at p. 214):

"Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution wherever it is essential, in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person who, as an officer of the state, is clothed with the duty of enforcing its laws, and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a Federal court of equity."

In:

Pierce, as Governor, et al. v. Society of Sisters, etc. (1925), 268 U. S. 510, 69 L. Ed. 1070,

suit was brought to enjoin the threatened enforcement of the Oregon Private School Law, the defendants named being: "Walter M. Pierce, as Governor of the State of Oregon; Isaac H. Van Winkle, as Attorney General of the State of Oregon; Stanley Myers, as District Attorney of Multnomah County, State of Oregon." Following its rulings in the *Truax* and *Terrace Cases,* supra, and in numerous others, the Court held that the suit was properly brought and might properly be maintained.

Compare:

Old Colony Trust Co. v. Seattle (1926), 271 U. S. 426, 70 L. Ed. 1019,

in which suit was brought against the individuals occupying the offices of County Treasurer and County Sheriff of King County, Washington. The objection was made that the suit was in both name and effect a suit against the state; but the Court held (271 U. S., p. 431) that this was "only a suit against state agents to restrain them from wrongful acts threatened and attempted under color of their agency"; and that the immunity conferred by the Eleventh Amendment did not avail.

To the same effect, see also:

Missouri Pacific R. Co. v. Norwood (1930), 42 F. (2d) 765,

in which suit was brought against Hal Norwood, Attorney General of the State of Arkansas, and certain

other prosecuting officers of that state, to enjoin the enforcement of the Arkansas Full Crew Law. The Court overruled the defendants' contention that the suit was against the state, citing the *Old Colony,* and *Young Cases,* among others. This case was subsequently appealed to the United States Supreme Court, and the decision of the lower court affirmed (1931: 283 U. S. 249), though without any discussion of the matter of jurisdiction. It is clear, however, that jurisdiction was not thought lacking because of the absence of proper parties to a justiciable controversy.

In:

Municipal Gas Co. v. Public Service Commission (1919), 225 N. Y. 89, 121 N. E. 772,

(opinion written by Mr. Justice Cardozo, as a member of the New York Court of Appeals), the principle of the *Young Case* was examined and applied; the court saying:

> "*The defendants are public officers charged with special duties in the enforcement of the statute.* Ex parte Young, 209 U. S. 123, 156, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764. *They assert a purpose to enforce it.* With them may appropriately be joined representatives of the class of consumers, who will be bound by the decree. Code Civ. Proc. Sec. 448. In a single comprehensive action, the plaintiff seeks a judgment which will end the controversy forever.
>
> "We think the suit is well conceived. With notable consistency, it has been held, whenever like controversies have arisen, that equity will

act. * * * Many of the most distinctive features of equity jurisdiction are present. * * * There is the avoidance of multiplicity of actions. There is the saving of waste and friction. There is the opportunity to analyze accounts so complex and vast as to be unintelligible to juries. * * * There is a protection against penalties that crush and against losses that cripple. Stress has been laid at times upon one element and at other times upon another. But resistance has yielded to their collective force.

"We reach the same conclusion. Undoubtedly, the plaintiff has some remedy at law. The decisive point is that it is not as complete or efficient as the remedy in equity. * * * This is no attempt by equity to restrain the enforcement of the criminal law, even if we were to assume that such an objection would invariably be fatal. * * * *The very purpose of the suit is a declaration of the plaintiff's rights which will enable it to shape its conduct in conformity to law.*" (Emphasis supplied.)

The principle established by this line of decisions disposes of defendant's argument completely; for, to paraphrase the language of the *Young opinion,* the fact that defendant by virtue of his office is directly connected with—indeed, has sole responsibility for—the enforcement of the challenged act is the important and material fact; and the power conferred upon him by the state to enforce the act (if the act be constitutional) sufficiently connects him with the duty of enforcement to make him a proper party to a suit against him *as an individual* (although identified, as here, as the Attorney General) to enjoin such enforcement.

It may be noted that in each of the cases last above cited, suit was brought against an individual or group of individuals occupying state positions, frequently having the same title as defendant. In most of these cases the defendants were identified by both their personal names and their official titles; in some they were even named *"as* Attorney General". In each case, however, the defendants were of necessity sued "as individuals"; they could not have been made defendants in their official capacities. In the *Truax, Old Colony,* and *Norwood Cases,* particularly, the courts pointed out, in response to defendants' objections, that the suits were not against the states, *but against the individuals,* acting under color of their respective state offices.

It is clear, from these cases, that if defendant had said to the plaintiff that *as Attorney General* he intended to and would enforce the Train-Limit Law against plaintiff in the event of violation, bringing such proceedings in his official capacity (of course he could not attempt to bring them in any other capacity), plaintiff would then be in a position to sue the defendant *as an individual,* seeking to enjoin such threatened prosecution, upon the ground that defendant intended and threatened to enforce an unconstitutional statute. In such case the defendant, as an individual, but because of his occupancy of the office charged with enforcement of the challenged law, would be a proper and necessary party; and there would be an actual controversy as to whether the power and duty of enforcement could be exercised as threatened.

No question could arise as to the fact of controversy, even though the suit were against defendant in his *individual,* and not his "official", capacity. In fact, in the light of the Eleventh Amendment, the suit could be maintained only as against the individual, but that restriction would not abate the controversy. The decisions above cited are conclusive.

Defendant, while he cannot avoid the force of the decisions of which the *Young Case* is typical, argues that each of them involved proceedings *for an injunction,* predicated on an actual threat to enforce a law asserted to be unconstitutional; whereas the instant complaint asks for only a *declaratory* judgment—not an injunction—and no actual threat is either alleged or shown. In other words, so says defendant, the essentials of a controversy, in a suit for a declaratory judgment, and particularly the essential that there be parties who have actual adversary interests in the subject matter, are not the same as in a suit for an injunction; and the authorities which establish that a state officer who is alleged to have threatened to prosecute may be and is a proper party, *as an individual,* to an actual controversy *in an injunction suit,* are of no value to support the proposition that a state officer who is shown to have claimed the right and duty of prosecution (but has not actually threatened to exercise it) is equally a proper party, *as an individual,* to an actual controversy *in a suit for declaratory relief.*

The fallacy of this argument is easily demonstrated. Suppose that plaintiff, being faced with a statement by defendant of his intention to enforce the law,

brings suit as before, against him as an individual, alleging the same facts: i. e., the unconstitutionality of the law and the threat of enforcement; but instead of asking for an injunction to prevent the threatened prosecution, it asks for a declaratory decree that the law is unconstitutional and that the threatened power of enforcement does not exist. Certainly, in those circumstances, there would be no lack of parties having an actual interest, giving rise to a justiciable controversy: for the same parties would be before the court, in the same adversary positions, as if the suit were for an injunction. The only difference would be that the plaintiff, instead of seeking the so-called "coercive" relief which, if granted, would require the issuance of process, had sought instead of the "milder" relief of a judicial declaration of the rights and powers of the parties. That determination and declaration would be necessary in any event, before an injunction could issue: for as pointed out in the *Municipal Gas Company Case,* supra:

> "The very purpose of the suit is a *declaration* of the plaintiff's rights which will enable it to shape its conduct in conformity to law."

In other words, the difference between a suit for an injunction, based upon threats of enforcement, and a suit for a declaratory judgment, similarly based, lies merely in the remedy sought, and not in any of the aspects of the case upon which the existence of a controversy is determined. In seeking to avail itself of the judicial power to render a declaratory judgment, a plaintiff merely takes advantage of a slightly

different *method of procedure,* to determine exactly the same basic controversy, the existence of which, if an injunction had been sought, could not have been questioned in the light of the controlling decisions.

That the essentials of a controversy are not changed, merely because declaratory rather than injunctive relief is sought, is squarely established by the *Wallace* and *Haworth Cases*, already cited, and also by:

United States v. West Virginia (1935), 295 U. S. 463 (475), 79 L. ed. 1546.

In the *Wallace Case* the Court stated the jurisdictional question before it (288 U. S., at p. 262):

> "Thus the narrow question presented for determination is whether the controversy before us, *which would be justiciable in this Court if presented in a suit for injunction, is any the less so because through a modified procedure appellant has been permitted to present it* in the state courts, *without praying for an injunction* or alleging that irreparable injury will result from the collection of the tax."

The Court answered that question *in the negative,* by saying (at p. 264):

> "The issues raised here are the same as those which under old forms of procedure could be raised only in a suit for an injunction or one to recover the tax after its payment. *But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular*

method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. * * * As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial." (Emphasis supplied.)

In the *Haworth Case,* it was said, with particular reference to the very statute under which the instant case is presented (300 U. S., at pp. 239-241):

"The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. *Thus the operation of the Declaratory Judgment Act is procedural only.* In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. (Citing cases.) Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. * * *

"* * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an ad-

> versary proceeding upon the facts alleged, *the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.* (Citing cases.) *And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required.*" (Emphasis supplied.)

In the *West Virginia Case* the Court said (295 U. S., at p. 475):

> "It is enough that that (Federal Declaratory Judgment) act is applicable only 'in cases of actual controversy'. *It does not purport to alter the character of the controversies* which are the subject of the judicial power under the Constitution." (Emphasis supplied.)

These decisions leave no doubt that if a justiciable controversy exists between a private citizen, such as plaintiff, on the one hand, and, on the other, an individual such as defendant who is clothed by the State with authority to enforce its laws, in a case where an injunction is sought, such a controversy continues to exist and a federal court has jurisdiction thereof, in a case in which the substituted procedure provided by the Declaratory Judgments Act is followed, and declaratory relief is asked for, rather than the so-called coercive relief of injunction. The essentials of a controversy remain the same; the essential and necessary parties thereto are not changed; and if a state officer sued in his individual capacity is a proper and necessary party to an injunction suit, he continues

to be a proper and necessary party when the altered procedure leading to declaratory relief is followed.

This, we believe, is precisely the essence of the Supreme Court decisions just cited. The point is well illustrated by the opinion of the Fifth Circuit Court of Appeals in:

Gully v. Interstate Natural Gas Co., supra,

in which it was said (82 F. (2d) 145, 149):

> "When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction under this statute, of the controversy to grant the relief of declaration, either before or after the stage of relief by coercion has been reached."

It may be noted that in the *Gully Case* the complainant had originally sought an injunction against certain state officers; but a supplementary complaint asking for declaratory relief was later filed. The Circuit Court of Appeals held that the trial court had properly taken jurisdiction of both the original complaint for an injunction, and the supplementary complaint for declaratory relief. The Supreme Court later denied a writ of review; and the Circuit Court's decision was cited with apparent approval in the opinion in the *Haworth Case:* 300 U. S., at p. 244.

Compare also, the recent decision in:

Sovereign Camp v. Wilentz, supra,

in which the complaint as filed named as defendants the Attorney General of New Jersey and certain other state officials. The complaint was in four counts, the

first three of which asked for injunctive relief, while the fourth asked for both declaratory and injunctive relief. The Court took jurisdiction of all four counts, holding that an actual controversy existed under the facts stated in the fourth count, as well as in the other three.

We have thus far discussed the question of defendant's actual interest, and consequent competency as a party to the controversy, upon the basis of the record in the trial court, without reference to the facts brought before this Court by plaintiff's motion to remand and defendant's response thereto: i. e., the prosecution of plaintiff in the state court, based on alleged violations of the Train-Limit Law; and defendant's contemporaneous public announcement of his belief in the validity of the law, and thus in the legal existence of the right and duty of prosecution. If there were any possible doubt of defendant's actual interest in the subject matter, these events should set it completely at rest: defendant is now in exactly the same position as were the various state officers in the several cases cited above, of which *Ex parte Young* is the leading example.

Defendant meets the present situation, however, by continuing to contend, as we understand him, that his action in the state court is *officially* undertaken, whereas he comes to the Federal Courts, if at all, only "as an individual"; that his official acts are entirely distinct from his individual acts, and have no

bearing whatever upon his individual position, nor any materiality in this suit against him "in his individual capacity".

It will be apparent at once that defendant's contention both supplies whatever elements of controversy may hitherto have been lacking, even accepting his own previous argument, and at the same time provides a ready-made answer to that controversy. Of necessity defendant can contend that the state court prosecution is an "official" act, only if he also contends that the law authorizing such prosecutions is constitutional. If it is unconstitutional, then under all the decisions his action, though under color of his office, is still not the official act of a state officer, but merely of an individual acting in the guise of the state office. The primary question in controversy is precisely whether defendant can "officially" exercise the power of prosecution; so that by asserting his official status defendant really begs the very question in suit.

It may be, however, that defendant, in order to maintain his position that no controversy here exists, will continue to assert that, "as an individual", he admits that the law is invalid. If so, there is still no lack of controversy; for then there will admittedly be before the Court two parties: (1) plaintiff, asserting that it is constitutionally protected against prosecution for operating "long" trains, and (2) defendant, asserting the right, and endeavoring, to maintain and carry on such prosecution. Moreover, defendant will then be admittedly acting in an individual capacity,

precisely the capacity in which he is sued in this Court; because if he admits unconstitutionality of the law, he thereby admits that in his conduct of the state prosecutions he cannot be acting officially.

Thus, whichever position defendant adopts, his action in having prosecuted plaintiff in the state court cannot be dissociated from his presence in the federal court; but, on the contrary, when taken with all other matters of record, establishes that an actual controversy, between competent parties, exists and has existed herein from the time that the suit was commenced.

4. IN THE EVENT THE COURT IS NOT PERSUADED TO REVERSE THE DECREE UPON THE BASIS OF THE RECORD BEFORE IT, THE CAUSE SHOULD BE REMANDED FOR FURTHER PROCEEDINGS, AS PROPOSED BY PLAINTIFF'S MOTION TO REMAND, HERETOFORE FILED.

In response to the suggestion of this court, in its order herein on June 19, 1940, plaintiff now renews its motion to remand the cause for the purpose of permitting a supplemental complaint to be filed and a supplemental showing made, relating to events which have taken place since the appeal to this Court was perfected. The events to which we refer are, as heretofore shown in support of the motion, the commencement of prosecutions under the Train-Limit Law, undertaken by defendant as Attorney General, on April 19, 1940, and an accompanying announcement, made by defendant on the same date, to the effect that he believed the Train-Limit Law to be valid and that power and duty to prosecute for each violation were vested in him.

The motion is presented in the alternative; i. e., to be granted only if this Court is not disposed to reverse the judgment on the record as made, or to give consideration at this time to said subsequent events in deciding this appeal.

In the memorandum heretofore filed supporting the motion, we have cited numerous authorities which establish that the remand of a cause for supplementary proceedings, when appeal has been taken, is the proper course to be followed in those cases where events have taken place since the trial court record was closed and the appeal taken, which have material bearing upon the determination of the cause and might, if of record, lead to a wholly different result. The leading case declaring this principle is:

Ballard v. Searls (1889), 130 U. S. 50, 32 L. Ed. 846.

Other cases supporting the same view include:

Drainage District No. 7 v. Sternberg (C.C.A. 8th, 1926), 15 F. (2d) 41 (44-45);

Jensen v. New York Life Ins. Co. (C.C.A. 8th, 1931), 50 F. (2d) 512 (514-515);

Simonds v. Norwich Union Indemnity Co. (C.C.A. 8th, 1934), 73 F. (2d) 412;

Central California Canneries Co. v. Dunkley Co. (C.C.A. 9th, 1922), 282 Fed. 406 (412);

Levinson v. United States (C.C.A. 6th, 1929), 32 F. (2d) 449 (450);

Isgrig v. United States (C.C.A. 4th, 1939), 109 F. (2d) 131.

These and other authorities declare that supplementary proceedings, such as plaintiff proposes, are proper when it appears that they tend to confirm a good cause of action originally pleaded.

Jenkins v. International Bank (1888), 127 U. S. 484 (488-489), 32 L. ed. 189;

Texarkana v. Arkansas Gas Co. (1939), 306 U. S. 188 (203); 83 L. ed. 598;

Napier v. Westerhoff (1907), 153 Fed. 985;

Kryptok Co. v. Haussmann & Co. (1914), 216 Fed. 267;

Insurance Finance Corp. v. Phoenix Securities Corp. (1929), 32 F. (2d) 711, 712;

International Ry. Co. v. Prendergast (1928), 29 F. (2d) 296, 298.

The filing of a supplemental pleading setting forth transactions, occurrences or events which have happened since the date of the pleading sought to be supplemented, is of course authorized by Rule 15(d) of the Federal Rules of Civil Procedure. In the recent *Texarkana Case,* cited supra, the Supreme Court referred to that rule, and said (306 U. S., at p. 203):

> "Where there is a good cause of action stated in the original bill, a supplemental bill setting up facts subsequently occurring which justify other or further relief is proper."

It is hardly open to question that the complaint in the instant case does set up a good cause of action. The record shows (R. 46) that defendant filed a motion to dismiss for failure to state a good cause of

action, which motion was overruled by the trial court (R. 52); and defendant thereafter elected to answer and go to trial. The adverse judgment against plaintiff was not rendered because of any failure to set forth a sufficient cause of action, but solely because plaintiff did not establish, to the satisfaction of the trial court, the fact of an actual and substantial dispute between the parties with respect to the subject matter.

In particular, the Federal Courts have often held that where a cause has been tried and determined, as this case has, upon the substantive issues, but there appears a failure of proof of essential *jurisdictional* facts, the cause will not be dismissed, but remanded to the trial court to permit necessary supplementary proceedings, such as the filing of an amended or supplemental pleading with respect to such jurisdictional facts; which issue of jurisdiction may then be tried.

Parker Washington Co. v. Cramer (C.C.A. 7th, 1912), 201 Fed. 878, 879;

Chicago, Rock Island & Pacific Ry. Co. v. Stevens (C.C.A. 6th, 1914), 218 Fed. 535, 540-541;

Chicago & A. R. Co. v. Allen (C.C.A. 7th, 1917), 249 Fed. 280, 284-285;

Ward v. Morrow (C.C.A. 8th, 1926), 15 F. (2d) 660, 662-663;

Coppedge v. Clinton (C.C.A. 10th, 1934), 72 F. (2d) 531, 536.

Defendant does not challenge or deny plaintiff's showing of the subsequent facts. He shows, however,

that, at his instance, the state court issued an order staying all prosecutions of plaintiff for alleged train-limit violations, except the prosecution just commenced, until the latter be determined. That stay order does not of course prevent the irreparable damage to plaintiff caused by daily compliance with the law.

Defendant has opposed our motion on four grounds:

(1) That the supplementary showing is immaterial, and in reality an attempt to set up a new cause of action;

(2) That such showing does not and cannot cure the want of jurisdiction allegedly existing when the complaint was filed;

(3) That such showing affirmatively indicates that the amount in controversy is less than $3,000.00, and that jurisdiction is therefore lacking; and

(4) That defendant, sued as an individual, has and can have no interest sufficient to make him a party to a controversy with plaintiff respecting the Train-Limit Law, and therefore the remand of the cause would be useless.

Defendant predicates his first point upon his position that this suit is against him in his "individual" capacity; whereas the state court prosecution has been undertaken, and the public statement issued, so it is said, in his "official" capacity. This general contention has been discussed in the last preceding subdivision, and need not be further reviewed. It is sufficient to say again that the ultimate question in the

case is whether defendant *can* act "officially"—i. e., within constitutional limits—in prosecuting plaintiff or threatening it with prosecutions for penalties under the challenged law; and when defendant contends that he is so acting, he demonstrates the existence of an actual controversy with plaintiff, as to whether the claimed "official" action has due and legal sanction under the Constitution.

The argument that the proposed showing attempts to set up a new cause of action misses the point entirely. Plaintiff is not proposing to sue defendant anew, because of these subsequent acts, but only to employ them as conclusive evidence to support its position as stated throughout this suit: namely, that from the beginning the parties have maintained opposing claims respecting a subject matter in which defendant, by virtue of his office, has a direct legal interest (*Ex parte Young,* supra).

In arguing that the supplementary matters can not cure the want of jurisdiction allegedly existing when the case was commenced, defendant really addresses himself to the weight, rather than the pertinency, of the proposed showing. We repeat that jurisdiction was found lacking in this cause for one reason only: that the record failed, in the view of the trial court, to show sufficiently that the parties actually maintained opposing views. The question now is whether these subsequent facts, when considered together with all other facts of record reflecting defendant's claims and opinions, overcome that supposed failure of proof. That question is essentially for the trial court to de-

termine; this Court need only consider whether the showing will reasonably tend to that end. Compare:

Ballard v. Searls, supra;

Jensen v. New York Life Ins. Co., supra;

Central California Canneries Co. v. Dunkley Co., supra.

In the *Central California Canneries Co. Case* this Court said (282 Fed., at p. 412):

> "Regarding the defendant's petition for review as in effect an application for leave to the lower court to entertain a petition for a rehearing (Simmons Co. v. B. S. Grier Bros. Co., supra), we are of the opinion that the defendants should be authorized to file in the lower court an appropriate petition for a rehearing, and that court should be authorized to entertain and make disposition of the same, according to equity, upon considerations addressed to the materiality of the new matter and diligence in its presentation, without restraint by reason of any proceedings heretofore had or orders made in this court; and it is so ordered."

Circuit Judge Hunt, concurring in the opinion of the Court, said further:

> "While I believe the appellate court in the exercise of a discretion has the power to decide that the bill, which is in the nature of a bill of review or motion for rehearing upon the ground of newly discovered evidence, may be filed, yet it is proper practice for such court to go no further than to hold that a sufficient showing is made to warrant it in granting to petitioner permission to apply to the District Court for leave to file the bill or motion (citing cases)."

The materiality and probative value of the supplementary showing, while not open to serious question, may be demonstrated, if we assume a prosecution commenced prior to the trial instead of afterward. Suppose, for illustration, that the cause had progressed up to and including the pre-trial conference, exactly as shown by the record; and that plaintiff, following that conference, and relying upon defendant's admissions of unconstitutionality, had at once commenced operating long trains; that defendant, acting "officially", had thereupon immediately initiated prosecutions in the state court, also at the same time making a public announcement of his beliefs, such as actually made on April 19, 1940. There would be no doubt, if the trial were held thereafter, that these matters would be competent and material evidence upon the question of "actual controversy"; and we think it equally clear that the same matters are just as material, and just as properly to be shown, although occurring after, instead of before, the trial and entry of decree in the lower court.

In his opposition, defendant lays great stress upon the decision in:

M. & St. L. R. R. Co. v. P. & P. Union Ry. Co. (1926), 270 U. S. 580, 70 L. Ed. 743.

In that case the Supreme Court denied a motion to remand for the purpose of showing subsequent facts, upon the ground that "the later facts alleged could not conceivably affect the result of the case before us", saying also that jurisdiction was dependent upon the state of facts existing at the time the suit was brought.

The case is clearly of little assistance to defendant; for the later facts here set forth do not merely show the existence of a controversy *as of the date of the commencement of the prosecution;* they tend strongly to confirm plaintiff's contention that defendant has *always* claimed to have the power and duty of prosecution, and *always* intended to exercise that power, if occasion arose. We are here necessarily dealing with proof addressed to a "state of mind", viewed in the light of defendant's statutory obligation, and as evidenced by his acts or declarations. The Court of Civil Appeals of Texas said in:

> *Shaw v. Cone* (1933), 56 S. W. (2d) 667 (at p. 671):
>
> "The generally recognized rule is that, where the issue is a state of mind with which a person acts, both parties should be allowed a wide field in proving the general course of the person's conduct under investigation, with each detail and ramification which might tend to color the conduct or characterize the intent which actuated it. U. S. Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co. (C. C. A. 8th, 1906) 148 F. 353; Massillon Mortgage Co. v. Independent Indemnity Co. (1930) 37 Ohio App. 148, 174 N. E. 167."

Defendant supports his third point—that the supplementary showing will demonstrate that the amount in controversy is less than $3000.00—by arguing that the action in the state court involves only two alleged violations, so that the total penalties imposed upon plaintiff therein could not exceed $2000.00. Reference

is also made to defendant's sworn statement that he will not institute any further prosecutions under the law, and to the stay order issued by the state court restraining any such further prosecutions. In this behalf defendant cites certain decisions of the Supreme Court which hold, generally, that when suit is brought to restrain the collection of taxes or license fees, the amount in controversy is measured by the amount of the taxes in dispute; and in such cases taxes or other fees which might be due in other years, or for other operations, cannot be considered.

The most recent of the cases cited by defendant is *Healy v. Ratta* (1934), 292 U. S. 263, 78 L. Ed. 1248. That case was brought to restrain local officers from enforcing an ordinance, imposing local licenses on door-to-door salesmen. It did not appear that the statute prohibited the activities of such salesmen, but only that the license fee was deemed to be excessive. The case is clearly not in point here, and indeed defendant's entire argument is wholly without merit, because:

(a) The instant suit was not brought to restrain defendant from collecting any fees or licenses from plaintiff, exacted for the privilege of doing business, or to restrain defendant from prosecuting plaintiff for conducting business without first securing a license. The purpose of this suit is to obtain a decree establishing the invalidity of a statute which commands a direct restriction of plaintiff's business, without reference to the payment of a tax or penalty. The statute is mandatory in its prohibition, not permissive;

it does not authorize or license plaintiff to operate long trains in consideration of a tax or fee.

(b) In a suit involving the invalidity of a restrictive statute such as the Train-Limit Law, the right to carry on the business free of the restriction, or the injury done to the business by operation of the restriction, is the matter in controversy; and the value of the right or injury is the measure of the value or amount in controversy. In:

Healy v. Ratta, supra,

the Court said (292 U. S., at p. 269):

> "Where a challenged statute commands the suppression or restriction of a business without reference to the payment of any tax, the right to do the business, or the injury to it, is the matter in controversy."

See also:

Bitterman v. L. & N. R. R. Co. (1907), 207 U. S. 205 (225), 52 L. Ed. 171;

Glenwood L. & W. Co. v. Mutual Light, etc., Co. (1915), 239 U. S. 121 (125, 126), 60 L. Ed. 174;

Western & Atlantic R. R. v. Railroad Commission (1923), 261 U. S. 264 (267), 67 L. Ed. 645;

Adam v. New York Trust Co. (1930), 37 F. (2d) 826.

(b) It is alleged (complaint, pars. II-b, V-h, VI-c: R. 4, 19-20, 23-24), admitted (R. 82-84), and found (R. 113, 114) that the value of the right sought to be established, i. e., the plaintiff's constitutional right to

operate its properties free of the restrictions of the Law, and the value or amount of the injury done to plaintiff by reason of the law's limitations, is greatly in excess of $3000.00, and in fact in excess of $300,000.00 per year.

Defendant's fourth point—his alleged lack of interest, as an individual, in the subject matter of the suit, and his consequent inability to be an effective party in that capacity to a justiciable controversy—has already been reviewed at length. We may point out again that this contention has been strongly pressed—has in fact been defendant's principal argument—from the very beginning of the case. It is predicated, as we have shown, upon the proposition, persistently advanced, that defendant *as an individual* is wholly distinct from defendant *as the Attorney General,* and that whatever may be done or said by him in either capacity has no bearing upon or relation to what he may say or do in the other. While the fallacy of this argument is obvious, yet its significance should not be overlooked. It demonstrates that defendant's action in prosecuting the plaintiff as soon as the occasion arose was only the culmination of a determination long since arrived at—probably when defendant first took his oath of office; but since that determination was, in defendant's view, "officially" made, it did not in his opinion bear any relation to his position *as an individual;* and when sued in the latter capacity, he could still, and did, disclaim any interest, and even *as an individual* admit that the law was and is invalid.

We respectfully urge the Court, in the event it concludes that upon the record as made, or consideration as well of the subsequent matters now placed before it by plaintiff's motion and defendant's response, that it is unwilling to reverse the judgment, to remand the cause to the trial court, with directions to permit plaintiff to file a supplemental complaint and make a supplementary showing, all as contemplated by plaintiff's original motion.

CONCLUSION.

This case presents an unusual, though not unprecedented situation.

There are before the Court, on the one hand, a plaintiff suffering the oppression of an admittedly void statute, which imposes heavy and continuing irreparable damage; on the other, a defendant who, though admitting his official connection with and sole responsibility for the enforcement of the void statute, denies that as the individual who occupies such office he has any interest in the statute or its enforcement. On that ground alone, and because he was sued "as an individual", defendant claims that no controversy exists with respect to his purported power and duty of prosecution; this, even though he has actually prosecuted plaintiff "officially", at once when the occasion arose, and now continues to maintain that prosecution.

The case clearly calls for a judgment which will expose and condemn the fallacious pretense upon which defendant rests his case.

The record in the lower court is in our view complete; no further trial is required. All that is needed is that the judgment be reversed with directions to the trial court to make and render a finding and conclusion to the effect that an actual controversy is established. Judgment and decree in plaintiff's favor will then follow as of course, based upon the other findings of fact already made.

However, if this Court should feel that a finding of the existence of a controversy will be strengthened or further supported by evidence of the overt acts, which evidence would be fully admissible had such acts been committed on the eve of trial, then we ask that the case be remanded for appropriate pleading and proof.

Dated, San Francisco, California,
July 11, 1940.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

The Federal Declaratory Judgments Act (28 U. S. Code 400):

"Sec. 400. (Judicial Code section 274d.) Declaratory judgments authorized; procedure:

(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not. (Mar. 3, 1911, c. 231, Sec. 274d, as added June 14, 1934, c.

512, 48 Stat. 955; as amended Aug. 30, 1935, c. 829, Sec. 405, 49 Stat. 1027.)"

The Arizona Train-Limit Law (Arizona Revised Statutes, 1928, Sec. 647):

"Section 1. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, their, or its line of road, or any portion thereof, any train consisting of more than seventy freight, or other cars, exclusive of caboose.

"Section 2. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, their, or its line of road, or any portion thereof, any passenger train consisting of more than fourteen cars.

"Section 3. Any person, firm, association, company or corporation, operating any railroad in the state of Arizona, who shall wilfully violate any of the provisions of this act, shall be liable to the state of Arizona for a penalty of not less than one hundred dollars, nor more than one thousand dollars, for each offense; and such penalty shall be recovered, and suits therefore brought by the attorney general, or under his direction, in the name of the state of Arizona, in any county through which such railroad may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals.

"Section 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

EXCERPTS FROM OPINIONS IN CASES CITED IN THE ARGUMENT.

Aetna Life Ins. Co. v. Haworth (C. C. A., 8th, 1936), 84 F. (2d) 695 (at p. 697):

"It will be noted from an examination of the statement served upon plaintiff that *no suit is threatened and no demand made by the defendants. The defendants simply assert* that the policies are in force and effect. The apprehension of the plaintiff is that suit will be brought against it at some time prior to the running of the statute of limitations.

"We are impressed that the situation thus presented by the petition amounts to no more than an 'assumed potential invasion' of plaintiff's rights, and that it does not for this reason present a justiciable controversy. State of Arizona v. California, 283 U. S. 423, 462, 51 S. Ct. 522, 75 L. Ed. 1154. The judicial power of the federal courts does not extend to the giving of mere advisory opinions or the determination of abstract propositions. State of Alabama v. Arizona, 291 U. S. 286, 291, 54 S. Ct. 399, 78 L. Ed. 798; United States v. West Virginia, 295 U. S. 463, 474, 55 S. Ct. 789, 79 L. Ed. 1546; State of New Jersey v. Sargent, 269 U. S. 328, 338, 46 S. Ct. 122, 125, 70 L. Ed. 289. To present an 'actual controversy' within the constitutional meaning of that phrase *there must be a statement of facts showing that the defendant is acting or is threatening to act in such a way as to invade, or prejudicially affect, the rights of the plaintiff.* The Declaratory Judgment Act does not change the essential requisites for the exercise of judicial power nor alter the character of controversies which are the subject of judicial

power under the Constitution. Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 325, 56 S. Ct. 466, 472, 80 L. Ed. .....; United States v. West Virginia, 295 U. S. 463, 475, 55 S. Ct. 789, 79 L. Ed. 1546." (Emphasis supplied.)

Aetna Life Ins. Co. v. Haworth (1937), 300 U. S. 227 (at pp. 239-241, 242-244), 81 L. Ed. 617:

"The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

"A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn v. United States Bank,* 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States v. Alaska S. S. Co.,* 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring Gold Co. v. Amador Gold Co.,* 145 U. S. 300, 301; *Fairchild v. Hughes,* 258 U. S. 126, 129; *Massachusetts v. Mellon,* 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See *Muskrat v. United States, supra; Texas v. Interstate Commerce Comm'n,* 258 U. S. 158, 162; *New Jersey v. Sargent,* 269 U. S. 328,

339, 340; *Liberty Warehouse Co. v. Grannis,* 273 U. S. 70; *New York v. Illinois,* 274 U. S. 488, 490; *Willing v. Chicago Auditorium Assn.,* 277 U. S. 274, 289, 290; *Arizona v. California,* 283 U. S. 423, 463, 464; *Alabama v. Arizona,* 291 U. S. 286, 291; *United States v. West Virginia,* 295 U. S. 463, 474, 475; *Ashwander v. Tennessee Valley Authority,* 297 U. S. 288, 324. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. *Nashville, C. & St. L. Ry. Co. v. Wallace, supra,* p. 263; *Tutun v. United States,* 270 U. S. 568, 576, 577; *Fidelity National Bank v. Swope,* 274 U. S. 123, 132; *Old Colony Trust Co. v. Commissioner, supra,* p. 725. *And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. Nashville, C. & St. L. Ry. Co. v. Wallace,* supra, p. 264." * * *

"There is here a dispute between parties who face each other in an adversary proceeding. The dispute relates to legal rights and obligations arising from the contracts of insurance. The dispute is definite and concrete, not hypothetical or abstract. Prior to this suit, the parties had taken adverse positions with respect to the disability benefits which were to be payable upon prescribed conditions. On the one side, the insured claimed that he had become totally and permanently disabled and hence was relieved of the obligation to continue the payment of premiums and was en-

titled to the stipulated disability benefits and to the continuance of the policies in force. The insured presented this claim formally, as required by the policies. It was a claim of a present, specific right. On the other side, the company made an equally definite claim that the alleged basic fact did not exist, that the insured was not totally and permanently disabled and had not been relieved of the duty to continue the payment of premiums, that in consequence the policies had lapsed, and that the company was thus freed from its obligation either to pay disability benefits or to continue the insurance in force. Such a dispute is manifestly susceptible of judicial determination. It calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication or present right upon established facts.

* * * * * * *

"If the insured had brought suit to recover the disability benefits currently payable under two of the policies there would have been no question that the controversy was of a justiciable nature, whether or not the amount involved would have permitted its determination in a federal court. Again, on repudiation by the insurer of liability in such a case and insistence by the insured that the repudiation was unjustified because of his disability, the insured would have 'such an interest in the preservation of the contracts that he might maintain a suit in equity to declare them still in being.' (Citing cases.) But the character of the controversy and of the isue to be determined is essentially the same whether it is presented by the insured or by the insurer. Whether the District Court may entertain such a suit by the insurer, when the controversy as here is between citizens

of different States or otherwise is within the range of the federal judicial power, is for the Congress to determine. It is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative. See *Gully v. Interstate Natural Gas Co.,* 82 F. (2d) 145, 149; *Travelers Insurance Co. v. Helmer,* 15 F. Supp. 355, 356; *New York Life Insurance Co. v. London,* 15 F. Supp. 586, 589." (Emphasis supplied.)

Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace (1933), 288 U. S. 249 (at pp. 261-262), 77 L. Ed. 730:

"That the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin collection of the tax cannot be questioned. See *Risty v. Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378; compare *Terrace v. Thompson,* 263 U. S. 197; *Pierce v. Society of Sisters,* 268 U. S. 510; *Euclid v. Ambler Realty Co.,* 272 U. S. 365. The proceeding terminating in the decree below, unlike that in *South Spring Hill Gold Mining Co. v. Amador Medean Gold Mining Co.,* 145 U. S. 300; *Muskrat v. United States,* 219 U. S. 346, was between adverse parties, seeking a determination of their legal rights upon the facts alleged in the bill and admitted by the demurrer. Unlike *Fairchild v. Hughes,* 258 U. S. 126; *Texas v. Interstate Commerce Commission,* 258 U. S. 158; *Massachusetts v. Mellon,* 262 U. S. 447; *New Jersey v. Sargent,* 269 U. S. 328, valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree

by the decision of the question of law; and unlike *Luther v. Borden,* 7 How. 1; *Field v. Clark,* 143 U. S. 649; *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U. S. 118; *Keller v. Potomac Electric Power Co.,* 261 U. S. 428; *Federal Radio Commission v. General Electric Co.,* 281 U. S. 464, the question lends itself to judicial determination and is of the kind which this Court traditionally decides. The relief sought is a definitive adjudication of the disputed constitutional right of the appellant, in the circumstances alleged, to be free from the tax, see *Old Colony Trust Co. v. Commissioner,* 279 U. S. 716, 724; and that adjudication is not, as in *Gordon v. United States,* 2 Wall. 561, and *Postum Cereal Co. v. California Fig Nut Co.,* 272 U. S. 693, subject to revision by some other and more authoritative agency. Obviously the appellant, whose duty to pay the tax will be determined by the decision of this case, is not attempting to secure an abstract determination by the Court of the validity of a statute, compare *Muskrat v. United States, supra,* 361; *Texas v. Interstate Commerce Commission, supra,* 162; or a decision advising what the law would be on an uncertain or hypothetical state of facts, as was thought to be the case in *Liberty Warehouse Co. v. Grannis,* 273 U. S. 70, and *Willing v. Chicago Auditorium Assn.,* 277 U. S. 274; see also *Warehouse Co. v. Tobacco Growers Assn.,* 276 U. S. 71, 88; compare *Arizona v. California,* 283 U. S. 423, 463."

Gully v. Interstate Natural Gas Co. (1936), 82 F. (2d) 145 (149) (cited with approval by the Supreme Court in the *Haworth Case,* 300 U. S., at p. 244):

"When, then, an actual controversy exists, of which, if coercive relief could be granted in it the federal courts would have jurisdiction, they may take jurisdiction under this statute, of the controversy to grant the relief of declaration, *either before or after the stage of relief by coercion has been reached.* (Citing cases.) * * *

"We see no reason why the statute should not, we think it should, be given the prophylactic scope to which its language, in the light of its purpose, extends, under which disputants as to whose rights there is actual controversy, may obtain a binding judicial declaration as to them, before damage has actually been suffered, and *without having to make the showing of irreparable injury and the law's inadequacy* required for the granting of ordinary preventive relief in equity. Though before the enactment of statutes of this kind declaratory relief was not of a general wideness, it is neither new nor strange in character. It has been granted numbers of times in construing instruments to give directions to trustees and others obliged to carry out written but doubtful directions. The purpose of the statute is, we think, wise and beneficial. It will, if applied in accordance with its terms, effect a profound, a far-reaching, a greatly to be desired procedural reform. We see no sound reason for limiting it." (Emphasis supplied.)

Edelmann v. Triple-A Specialty Co. (C. C. A., 7th, 1937), 88 F. (2d) 852 (at p. 854):

"The Declaratory Judgment Act merely introduced additional remedies. *It modified the law only as to procedure* and, though the right to such relief has been in some cases inherent, the statute extended greatly the situations under which such relief may be claimed. *It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.* But the controversy is the same as previously. Heretofore the owner of the patent might sue to enjoin infringement; now the alleged infringer may sue. But the controversy between the parties as to whether a patent is valid, and whether infringement exists is in either instance essentially one arising under the patent laws of the United States. It is of no moment, in the determination of the character of the relief sought, that the suit is brought by the alleged infringer instead of by the owner." (Emphasis supplied.)

Bliss v. Cold Metal Process Co. (C. C. A., 6th, 1939), 102 F. (2d) 105 (at p. 108) (After citing *Aetna Life Insurance Company v. Haworth,* supra):

"Tested by these rules and by the application made of them to the facts in the Aetna case, there is here a justiciable controversy. The defendant asserts that the plaintiff's structures infringe patents which it owns and which it claims are valid.

The plaintiff denies infringement and has invited suit against it upon the patents without response. It denies the validity of the patents, and has so notified the defendant at least by its bill if not prior thereto. The parties stand in adversary positions in respect to legal rights and obligations. Their differences are concrete and not hypothetical or abstract. It is of no moment in the determination of the character of the relief sought that the suit is brought by the alleged infringer instead of by the owner. Edelmann & Co. v. Triple-A Specialty Co., 7 Cir., 88 F. 2d 852.

"Circumstances may contain all of the elements out of which a controversy may arise and yet there will be no controversy if one claiming a right or interest invaded by another does not choose to assert his right. Likewise may there be circumstances pointing to a possible controversy in the past, without present actuality, by reason of abandonment or change of position by adversaries. But these speculations may not be indulged in in respect to the present situation of the parties. While the defendant made public claims of infringement many years before the filing of the bill, it has now charged customers of the plaintiff with infringing its patents through the instrumentality of mills purchased from the plaintiff and has brought suits against them. *Since the filing of the bill it has brought suit for infringement against the plaintiff itself. All doubts as to the existence of a present controversy are now dispelled.*" (Emphasis supplied.)

lation of it. The plaintiffs are 'interested' parties; if the patent is valid, their business is ruined. *They seek a declaration of their right to continue their business despite the issuance of a patent to the defendants. This is a 'right' or 'legal relation' that the court has power to declare.*

"It is said that a suit by a private party who has no patent himself to declare a competitor's patent void is without precedent. The charge is true. Heretofore the actions arising under the patent laws and cognizable in the federal courts have been suits in equity to obtain a patent (35 USCA Sec. 63), suits in equity to cancel an interfering patent (section 66), actions at law for damages by infringement (section 67), suits in equity for injunction and other relief because of infringement (section 70), and suits in equity by the United States to cancel a patent for fraud (United States v. American Bell Telephone Co., 167 U. S. 224, 17 S. Ct. 809, 42 L. Ed. 144). But the Declaratory Judgment Act was passed with the purpose of affording relief in cases that could not be tried under existing forms of procedure. It is a remedial statute and should be construed and applied liberally." (Emphasis supplied.)

Ex Parte Young (1908), 209 U. S. 123 (at pp. 157-161), 52 L. Ed. 714:

"In making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party.

"It has not, however, been held that it was necessary that such duty should be declared in the same act which is to be enforced. In some cases, it is true, the duty of enforcement has been so imposed * * *, but that may possibly make the duty more clear; if it otherwise exist it is equally efficacious. *The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact, and whether it arises out of the general law, or is specially created by the act itself, is not material so long as it exists.*

"* * * If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States. * * *

"It would seem to be clear that the Attorney General, under his power existing at common law and by virtue of these various statutes, had a general duty imposed upon him, which includes the right and the power to enforce the statutes of the State, including, of course, the act in question, if it were constitutional. *His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court.*" (Emphasis supplied.)

No. 9474

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY
(a corporation),

Appellant,

vs.

JOE CONWAY,

Appellee.

APPELLEE'S BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

CONSTITUTION AND STATUTES

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Appellee.

APPELLEE'S BRIEF

(The parties are designated as in the trial court: i. e. appellant as "plaintiff", appellee as "defendant.")

I. JURISDICTION

There was a want of jurisdiction in the District Court for the reason that no case or controversy is presented by the record within the judicial powers conferred upon courts of the United States by Section 2, Article III, of the Constitution of the United States.

The suit was originally brought in the District Court by the plaintiff filing, on April 18, 1939, a complaint seeking a declaratory judgment declaring the Arizona Train-Limit Law unconstitutional.

The answer of the defendant denied the jurisdictional allegations of the complaint and admitted the allegation

going to the question of the constitutionality of the law. No controversy was then presented by the pleadings.

Likewise in his deposition and at the Pre-Trial Conference defendant denied the allegations of the complaint going to the question of the jurisdiction of the Court and admitted the allegations of the complaint going to the question of the constitutionality of the law and no controversy is presented within the judicial power of a United States Court.

Judgment was entered by the District Court dismissing the suit for want of controversy.

Jurisdiction in this Court to entertain and decide the case upon appeal is claimed by plaintiff under Section 225, Title 28, U. S. Code.

II. STATEMENT OF THE CASE

Defendant accepts the plaintiff's statement of the case except the conclusions drawn by plaintiff from the facts stated. Since we believe that the question of the conclusions to be drawn from the facts is more properly a part of the argument, we reserve a discussion of this question as a part of our argument.

Two questions are involved in the appeal:

1. Did the Trial Court err in amending its order on the Pre-Trial Conference?

This question arises by reason of the order of the District Court, entered on motion of defendant, amending the order entered on the Pre-Trial Conference.

2. Did the Trial Court err in entering judgment dismissing the suit for want of controversy?

This question arises on the judgment entered by the District Court.

III. SUMMARY OF ARGUMENT

1. The District Court properly exercised its discretion in amending its order entered on the Pre-Trial Conference.

(a) The original order on Pre-Trial Conference wherein it was stated that defendant admitted all the allegations of paragraph I of the complaint was contrary to the record and the order was properly entered amending the order on Pre-Trial Conference to show the allegations of paragraph I(b) of the Complaint were denied by defendant.

(b) The original order on Pre-Trial Conference was properly amended to show the defendant denied that part of paragraph XVI of the complaint reading as follows:

> "As heretofore alleged, said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said Act which it may commit."

The record on the Pre-Trial Conference clearly shows that the admission of this allegation by counsel at such conference was inadvertent and unintentional and the amendment was proper in the interest of justice.

The admission of this allegation caused a contradiction in the record on the Pre-Trial Conference and it was proper for the Trial Court to determine the true situation and to correct the record accordingly.

2. A case or controversy within the judicial power of a United States Court is not presented by the record and the District Court properly dismissed the suit.

(a) No opposing claims are presented in the record as to the constitutionality of the Arizona Train-Limit Law or as to the powers and duties of the defendant with respect to the enforcement of the Arizona Train-Limit Law, and so no controversy.

(1) Defendant never claimed or maintained the Arizona Train-Limit Law is constitutional or imposed upon him, either in his individual or official capacity, a power or duty of enforcement.

(2) No duty of enforcement is imposed upon defendant, either in his individual or official capacity, by reason of a presumption in favor of the constitutionality of the law.

An unconstitutional act is not a law.

(b) If opposing claims were presented, the question is academic and presents no case or controversy within the judicial power of a United States Court.

(c) The defendant, Joe Conway, in his individual capacity, the capacity in which he is sued, has no interest in the subject matter of the complaint and action sufficient to give rise to a controversy.

3. The action is against the State and barred by the Eleventh Amendment to the Constitution of the United States.

4. The motion to remand was properly denied.

(a) The matter sought to be presented by supplemental complaint has no relevancy to the question raised by the original record.

(b) The situation presented by the Motion to Remand and Response to Motion to Remand shows the jurisdictional amount is not involved.

(c) The situation presented by the Motion to Remand and Response to Motion to Remand shows a want of equity jurisdiction.

IV. ARGUMENT

1. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN AMENDING ITS ORDER ENTERED ON THE PRE-TRIAL CONFERENCE.

(Specification of Error No. 1)

On the order of the District Court a Pre-Trial Conference was held below, following which the District Court entered its order as to admissions of fact by the defendant (R. 92). The defendant then moved to amend the order (R. 93), which motion the District Court granted (R. 96). The action of the District Court in amending the order on Pre-Trial Conference is assigned as error.

By the amendment certain allegations in paragraph I(b) and in paragraph XVI of the complaint, shown by the original order as having been admitted, were shown as denied.

(a) Paragraph I(b)

The original order on the Pre-Trial Conference stated that *all* the allegations contained in paragraph I of the plaintiff's complaint were admitted. In this the order was contrary to the record.

Paragraph I(b) of the complaint, in part, alleged that under the Constitution and laws of the State of Arizona there was vested in the defendant, as Attorney General, the exclusive power and the mandatory duty by prosecutions to enforce the Train-Limit Law. Both in his answer (R. 53, 54) and at the Pre-Trial Conference (R. 76, 77, 78) the defendant admitted these allegations *only* as applied to a *constitutional* law and expressly denied that any power or duty was imposed by reason of any presumption of constitutionality (R. 76). Plaintiff recognizes that such is the record (Appellant's Brief, p. 6, 7, 36).

Since the allegation was admitted *only* as it applied to a constitutional law, it was denied insofar as it applied to an

unconstitutional law. The defendant having thereafter admitted the allegations of the complaint going to the merits, and in effect, if not in fact, having admitted the unconstitutionality of the Arizona Train-Limit Law, the answer to the above allegations of paragraph I(b) of the complaint becomes a denial of such allegations. We respectfully submit that this amendment to the order on the Pre-Trial Conference was proper.

(b) Paragraph XVI

In response to a question by the Court at the Pre-Trial Conference, counsel for defendant stated that the whole of paragraph XVI of the complaint was admitted.

Paragraph XVI is lengthy (covering approximately two and one-half pages of the printed record herein) and has for its subject the "Extent and Cumulative Character of Penalties for Violation of Train-Limit Law" (R. 40, 41, 42). Approximately midway through the paragraph appears the following allegation:

> "As heretofore alleged, said defendant claims and maintains that it is and will be his duty, as Attorney General, to prosecute and sue plaintiff for each and every violation of said Act which it may commit." (R. 41.)

In stating to the District Court that defendant admitted the whole of paragraph XVI counsel for defendant inadvertently overlooked and unintentionally admitted the above quoted part of the paragraph. Such admission is contrary to fact and erroneous, but was not discovered until the order of the District Court on the Pre-Trial Conference was received, when counsel for defendant immediately informed plaintiff of defendant's intention to move for an order amending the order of the Court by showing this allegation of the complaint to be denied by defendant. The amendment was ordered by the Court. The action of

the Court in amending the order was a proper exercise of the Court's discretion and to prevent a manifest injustice.

It is clear from the record that it was not the intention of the defendant to admit this allegation.

An allegation in paragraph XV almost identical with the above allegation of paragraph XVI was expressly denied at the Pre-Trial Conference (R. 87, 88, 89, 90).

> (The allegation in paragraph XV reads: "and said defendant further claims and maintains that, in the event of violation of said law by plaintiff, it is and will be his duty forthwith to institute or direct the institution of proceedings to recover from the plaintiff the penalties provided in said law and otherwise to enforce compliance therewith by plaintiff." R. 38.)

Again, a very similar allegation in paragraph I(b) of the complaint was denied at the Pre-Trial Conference (R. 75-79).

Certainly with these denials in the record of the Pre-Trial Conference the District Court was not warranted in asserting that defendant admitted these allegations. With these contradictions in the record there was no basis in the record to enter an order finding or holding that defendant either admitted or denied such allegations. The record being contradictory, it was proper for the Court to determine the true intent of the parties and correct the record accordingly. That the District Court did.

Upon any fair and impartial examination of the record it cannot be doubted that in admitting *all* the allegations of paragraph XVI the defendant inadvertently overlooked this allegation; and that the defendant in truth did not intend to admit such allegations but in fact denied the same. The answer of the defendant expressly denied this allegation as well as similar allegations in paragraphs

I(b) and XV. Also in his Affidavit in Support of Motion to Dismiss and in his deposition, placed in evidence by plaintiff, defendant denied that he maintained or claimed that the Train-Limit Law imposed any duty upon him to prosecute or direct prosecutions thereof (R. 47, 48, 132, 140, 141). And under no fair or honest interpretation of the record in this cause could it be stated that the defendant maintained that the Train-Limit Law imposed a duty on the defendant to prosecute or direct prosecution of violation *unless the law is constitutional.* And the record is uncontradicted that defendant admitted the allegations of the complaint going to the question of the constitutionality of the law. Not only has defendant never maintained, as plaintiff states (p. 41, Appellant's Brief) that the Train-Limit Law casts upon him the power and duty of enforcement, but defendant has consistently contended that if, as plaintiff contends, the Train-Limit Law is unconstitutional, then it does not impose any duty whatsoever on defendant (R. 47, 48, 53, 54, 65, 66, 67, 68). Certainly the defendant has never made the absurd contention that an unconstitutional law imposed a duty upon him. It then would have been an injustice to place in defendant's mouth a contention he did not make. It is absurd to argue, as plaintiff does (p. 42, Appellant's Brief), that no injustice can fall to defendant by having judgment rendered against him declaring the Train-Limit Law void. It is an injustice to defendant to attempt to compel him as an *individual* to bear the burden of defending a law in which he has no interest, to attempt to force upon him contentions he has never made, and to attempt to place upon him the burden and expense of litigation in which he has no interest.

The District Court properly amended the Order on the Pre-Trial Conference.

Capano v. Melchionno (Mass.), 7 N. E. 2d 593, 599.

2. A CASE OR CONTROVERSY WITHIN THE JUDICIAL POWER OF A UNITED STATES COURT IS NOT PRESENTED BY THE RECORD AND THE DISTRICT COURT PROPERLY DISMISSED THE SUIT.

(Specification of Error Nos. 2 to 7 incl.)

FOREWORD

As appellant has stated (Appellant's Brief, 20), these specifications of error in effect relate to a single question, namely: Did the trial court err in concluding from the record below that no actual case or controversy is presented by the record herein within the scope of the judicial power of the United States Courts?

The plaintiff admits (Appellant's Brief, 21) that the trial record does *not* establish "any controversy between the parties as to the abstract question of the constitutionality of the Train-Limit Law, considered apart from the question of defendant's claimed power and duty of enforcement."

As plaintiff states, the defendant admitted the plaintiff's allegations of fact from which may be drawn the conclusion that the Arizona Train-Limit Law is unconstitutional and also admitted the paragraphs of the complaint in which the invalidity of the law was alleged in precise terms (Appellant's Brief, 22, 23). In other words, the plaintiff alleged, and defendant admitted, that the Train-Limit Law is unconstitutional. No issue or controversy could then be presented upon such question.

Robinson v. Anderson, 121 U. S. 522; 7 S. Ct. 1011.

But plaintiff contends that the defendant, although admitting the unconstitutionality of the law, asserts the power and duty on his part to enforce such unconstitutional law, and that a controversy is thereby presented. And in the words of the plaintiff, "the controversy relates, * * * not to the question of the constitutionality of the law, but

solely to the question whether the defendant *presently* (i. e., in advance of any final judicial determination) has any power or duty of enforcement in the event of violation."

We agree with plaintiff that no case or controversy is presented by the record as to the constitutionality of the Train-Limit Law. And since no case or controversy within the judicial power of a United States Court as to the constitutionality of the law is presented, no finding, judgment or decree touching its constitutionality may be entered.

We are not in agreement with the plaintiff that the record presents a case or controversy as to the defendant's power or duty of enforcement in the event of a violation of the law. And since plaintiff's contention is "solely to the question whether the defendant *presently* (i. e., in advance of any final judicial determination) has any power or duty of enforcement in case of violation" (Appellant's Brief, 23) the sole question presented by Specification of of Error Nos. 2 to 7 is whether or not the record presents a case or controversy as to the defendant's power or duty of enforcement in case of violation of the law.

(a) No opposing claims are presented in the record as to the constitutionality of the Arizona Train-Limit Law or as to the powers and duties of the defendant with respect to the enforcement of the Arizona Train-Limit Law, and so no controversy.

(Specification of Error Nos. 2 and 3)

1. Defendant never claimed nor maintained the Arizona Train-Limit Law is constitutional or imposed upon him, either in his individual or official capacity, a power or duty of enforcement.

It is, perhaps, proper to first point out that the purpose of the action is to obtain a declaratory judgment declaring *the Arizona Train-Limit Law unconstitutional.* It is so

stated by plaintiff in the jurisdictional paragraph of its complaint (R. 4) and at page 3 of its brief. An examination of the jurisdictional paragraph of plaintiff's complaint (R. 4) discloses that the question of defendant's duty is not the purpose of, nor put in issue by, the action.

Defendant has never claimed the power or duty to enforce the Train-Limit Law. On the contrary, he has admitted its invalidity and denied any duty to enforce an unconstitutional law, thus denying any duty to enforce the Train-Limit Law.

However, plaintiff here, in its effort to show a controversy, asserts that the defendant, although admitting and agreeing the law is unconstitutional, claims and maintains he has the power and duty to enforce the Train-Limit Law in event of violation and that such position or contention by the defendant in this regard is shown by the admissions and assertions in his testimony on deposition, and on his behalf at the Pre-Trial Conference, and *solely* on this contention bases its claim that a controversy exists. It therefore becomes necessary to determine from the record just what the defendant does claim and maintain as to his power or duty of enforcement.

The affidavit of the defendant was filed in support of his *motion to dismiss*. In this affidavit the defendant stated that he "does not claim or maintain, and has not claimed or maintained, * * * that in the event of violation of said law by plaintiff it is or will be affiant's duty to institute or to direct the institution of proceedings to recover from the plaintiff the penalties provided in said law or otherwise to enforce compliance therewith by plaintiff. In this connection affiant says that in his individual capacity, the capacity in which he is here sued, the affiant has no duty or authority in connection therewith, and has no interest in the determination of the validity or constitu-

tionality of said Arizona Train-Limit Law; that if said Arizona Train-Limit Law is unconstitutional, as plaintiff contends, affiant in his official capacity as Attorney General of the State of Arizona has no duty or authority to enforce said Arizona Train-Limit Law and has no duty to perform in connection with said law" (R. 47, 48).

In paragraph IV of his *answer* (R .53) defendant denied that the Train-Limit Law imposed any power or duty in him in his individual capacity and alleged that *only if it was constitutional* did it impose a duty upon him in his official capacity.

In paragraph XXII (R. 65) and paragraph XXIII (R. 68) of his *answer* the defendant expressly denied that he claims or maintains that is or will be his duty to institute or direct the institution of actions against plaintiff in the event of violation of the law.

Defendant's statements at the *Pre-Trial Conference* were in accord with those in his answer, referred to above, except that an allegation in paragraph XVI of the complaint was overlooked and inadvertently admitted. But such admission was, on motion and order of the Court, corrected before trial. (See argument under Specification of Error No. 1.)

And finally, in his *deposition* defendant denied that any duty was imposed upon him by the Train-Limit Law unless the law is constitutional (R. 132, 141).

The foregoing constitutes the record insofar as it relates to allegations or statements of the defendant with respect to his duties under the Train-Limit Law. From this record—Defendant's Affidavit in Support of Motion to Dismiss, Defendant's Answer, Defendant's Deposition, and Defendant's Admissions on Pre-Trial Conference—it is clear that the defendant has, and does, claim and maintain

that the law imposes *no* duty upon him in his individual capacity, and imposes a duty upon him in his official capacity *only if it is constitutional.* And since he admitted the law is unconstitutional, he, as does plaintiff, claims that *no* duty or power is imposed by the law.

The statement, then, by plaintiff (Appellant's Brief, 23) that defendant asserts and maintains that the power and duty of enforcement exists in him, even though the law is unconstitutional, is not only not sustained by the record but is contrary to the record.

It must follow, then, that no controversy is presented unless, as plaintiff contends (Appellant's Brief, 23) defendant, by taking his oath of office and thereby stating his intention to fulfill the duties of the office, and by failing to disavow any intention to enforce the Train-Limit Law, evidences a claim of duty to enforce the Train-Limit Law.

2. No duty of enforcement is imposed upon defendant, either in his individual or official capacity, by reason of a presumption in favor of the constitutionality of the law.

Upon this proposition a rather peculiar or unusual situation is presented. In its effort to find a controversy plaintiff states that defendant "claims and asserts that the power and duty of prosecution nevertheless continue" notwithstanding the law is unconstitutional. The argument then made *by plaintiff* is *not against but in support* of *defendant's* supposed claim or contention.

In other words, while asserting that such contention is on the part of defendant, plaintiff proceeds to present argument, not against but in support thereof.

The truth is, defendant never has, and does not now, claim or maintain that the Train-Limit Law if unconstitutional imposed any power or duty upon him. On the

contrary, defendant has contended and does contend that *neither* his oath of office *nor* the Train-Limit Law, if such law is unconstitutional (and it was admitted to be unconstitutional) imposed *any* power or duty upon him either in his official or individual capacity.

The oath of office taken by the Attorney General is that he will "support the Constitution of the United States and the Constitution and Laws of the State of Arizona * * *". (Sec. 63, Revised Code Arizona 1928). The Attorney General, by refusing to enforce an unconstitutional act does not violate this oath of office.

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."
>
> *Norton v. County of Selby,* 118 U. S. 425; 6 S. Ct. 1121.

And see:

> *Chicago etc. Co. v. Hackett,* 228 U. S. 559; 33 S. Ct. 581.
>
> *Ex Parte La Prade,* 289 U. S. 444; 53 S. Ct. 682.
>
> *Little Rock etc. Co. v. Worthen,* 120 U. S. 97; 7 S. Ct. 469.

And to enforce, or attempt to enforce, an unconstitutional act would violate his oath to support the Constitution of the United States.

The plaintiff argues that the duty is, and was, on the part of the defendant to disavow his intention to enforce the Train-Limit Law and that failure to disavow constitutes a threat.

This contention, if sustained, would require the Attorney General immediately upon taking office to examine

into and formulate an opinion as to the constitutionality of *every* law, the duty of enforcing which is imposed upon him, although no occasion for the exercise of such duty has arisen, and disavow his intention to enforce each such law or risk the possibility of being required in his individual capacity and at his own expense to sustain in court the constitutionality of *each* law to which no disavowal is made. Such a contention is absurd. No law, state or federal, imposes such a duty upon an officer. As the Supreme Court has said, *an unconstitutional act is no law.*

The so-called "negative order" cases, cited by plaintiff, have no application. Those cases involved action, not inaction, on the part of the defendant. The boards or commissions there were authorized to act, and did act, upon the petitions filed before them. Their action was negative—that is, denied the petition—but it was action nevertheless. Such is not the case here.

In its brief (Appellant's Brief, 29-30) plaintiff argues that the oath of office of defendant together with the declaration of the statute imposing upon defendant the duty of enforcement constitutes a threat or a claim of duty to enforce, which, under the La Prade case, supra, can only be avoided by a disavowal of such duty.

But the La Prade case did not hold as plaintiff contends. On the contrary, the Supreme Court in the La Prade case said that "The mere declaration of the statute that suits for recovery of penalties shall be brought by the Attorney General is not sufficient" (page 458 of opinion) to constitute a threat. This is in harmony with the opinions cited supra holding that an unconstitutional law is no law and imposes no duties. If such statutory declaration is not sufficient to constitute a threat, it cannot constitute a claim of power and duty to enforce the statute requiring a disavowal by defendant.

And it is submitted that if a disavowal were necessary the defendant's admission that the law is unconstitutional and his denial of any duty of enforcement under an unconstitutional act is a disavowal.

The Supreme Court of the United States has several times held that where the defendant files a disclaimer or admits the contentions of the plaintiff, thus tendering no issue, no case or controversy is presented and the Court shall proceed no further but at once dismiss.

Robinson v. Anderson, 121 U. S. 522; 7 S. Ct. 1011.

Devine v. Los Angeles, 202 U. S. 313; 26 S. Ct. 652.

Crystal Sprgs. etc. Co. v. Los Angeles, 177 U. S. 169; 20 S. Ct. 573.

Rosenbaum v. Bauer, 120 U. S. 450; 7 S. Ct. 633.

And see Jud. Code, Par. 37; 28 U. S. C. 80.

Here it was the duty of the District Court to dismiss the action when defendant filed his answer admitting plaintiff's contentions and disclaiming any opposing contention.

Nor was any controversy thereafter presented. As is seen from the record defendant at all times admitted the act was unconstitutional, and asserted that no duty was imposed upon him to enforce it. No case or controversy was presented and the case was properly dismissed.

(b) If opposing claims were presented, the question is academic and presents no case or controversy within the judicial power of a United States Court.

(Specification of Error Nos. 4, 5, 6 and 7)

The plaintiff concedes that no case or controversy is presented by the trial record upon the question of the constitutionality of the Train-Limit Law (Appellant's Brief,

21, 23). The *sole question* (and thus the sole contention on plaintiff's part) presented by Specification of Error Nos. 2 to 7 is that a case or controversy is presented as to whether the defendant "has any power or duty of enforcement in case of violation" of the Train-Limit Law (Appellant's Brief, 23).

The evidence is uncontradicted that there had been no violation of the Train-Limit Law (R. 49, 140, 141).

Likewise the evidence is undisputed that there had been no act or threat on the part of the defendant to enforce the law. In his Affidavit in Support of Motion to Dismiss (R. 47, 48), placed in evidence by the plaintiff, defendant denied that he had any duty whatsoever, in his individual capacity, to enforce the law, and denied that he had any duty in his official capacity if the law was unconstitutional. Further, he stated that he had made no study of the law and had formed no opinion as to its constitutionality or unconstitutionality.

In his answer he admitted the allegations of the complaint going to the validity of the act and denied he claimed or maintained that the law imposed a duty upon him to enforce it if it is unconstitutional. In other words, he admitted the law was unconstitutional and denied that such unconstitutional law imposed any duty of enforcement upon him (R. 53, 65, 68). Surely this could not be construed as a threat to enforce the law.

In his deposition he stated that since there had been no violation of the law called to his attention, he had had no occasion to consider the law and had formed no opinion as to its validity or invalidity (R. 140); that before he would take any steps to enforce the law he certainly would spend some time to go into the law and determine its validity or invalidity (R. 141).

Finally, at the Pre-Trial Conference he admitted the act was unconstitutional and denied any duty to enforce an unconstitutional law (R. 76, 86-91).

From this it is seen that the defendant has denied any act or threat on his part to enforce the law, and there is no evidence to the contrary.

Since there has been no violation, no act or threat to enforce, there is no present situation, no present right or status or relation to which a judgment declaring the duty of the defendant, either in his individual or official capacity, can apply.

Upon the record the question presented is purely abstract and hypothetical. No present status or relation is shown calling for the exercise or performance of the power or duty set forth in the act. No violation has occurred and so no occasion exists calling for the present performance of any duty under the law. Any judgment or decree entered upon this record would be purely advisory, applying, not to a present existing situation, but to a contingent and hypothetical future situation which might never arise —a decree advising Conway, as Attorney General (not the defendant Conway in his individual capacity) as to his power and duty in the future should a violation of the law occur. Such a record presents no case or controversy within the judicial power of a United States Court.

Liberty Warehouse Co. v. Grannis, 273 U. S. 70; 47 S. Ct. 282.

Muskrat v. United States, 219 U. S. 346, 357; 31 S. Ct. 250.

Fairchild v. Hughes, 258 U. S. 126, 129; 42 S. Ct. 274.

Massachusetts v. Mellon, 262 U. S. 447, 448; 43 S. Ct. 597.

New Jersey v. Sargent, 269 U. S. 328, 330; 46 S. Ct. 122.

California v. San Pablo & T. R. Co., 149 U. S. 308; 13 S. Ct. 876.

The operation of the Declaratory Judgment Act is procedural only.

"It does not purport to alter the character of controversies which are the subject of judicial power under the Constitution."

United States v. West Virginia, 295 U. S. 463; 55 S. Ct. 789.

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227; 57 S. Ct. 461.

Ashwander v. Tenn. Valley Auth., 297 U. S. 288; 56 S. Ct. 466.

"The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."

Aetna Ins. Co. v. Haworth, supra.

"* * * it is not open to question that the judicial power vested by Article 3 of the Constitution * * * is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case."

Liberty Warehouse Co. v. Grannis, supra.

No definite or concrete controversy is presented here—only a hypothetical or abstract situation which may never occur. No judgment could be pronounced which could be carried into effect. There are no acts or threats to enforce

the law which may be enjoined as in *Ex Parte Young*, 209 U. S. 123; 28 S. Ct. 441.

Even if the law is constitutional, it imposes no duty on Conway *in his official capacity as Attorney General* until there has been a violation. There having been no violation, any judgment entered can only be to advise the Attorney General as to his duties in event there should be a violation.

No justiciable controversy is presented and the action was properly dismissed.

(c) The defendant, Joe Conway, in his individual capacity, the capacity in which he is sued, has no interest in the subject matter of the complaint and action sufficient to give rise to a controversy.

(Specification of Error Nos. 2 to 7 incl.)

The defendant, Joe Conway, is the duly elected and acting Attorney General of the State of Arizona. In this action, however, he is sued *in his individual capacity* and not in his official capacity as Attorney General (R. 3).

No legal relation exists between the defendant in his individual capacity (the capacity in which he is here sued) and the plaintiff by reason of or in relation to the Arizona Train-Limit Law. No legal interest of the defendant in his individual capacity, adverse to the interest of the plaintiff or otherwise, is affected by such law. Defendant in his individual capacity will neither be injured by the law being held unconstitutional nor benefited by its constitutionality being sustained. He "has merely a general interest common to all members of the public." That is not a sufficient interest to entitle the defendant to invoke the jurisdiction of a United States Court.

> "* * * The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is in-

sufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public."

Ex Parte Levitt, 302 U. S. 633; 58 S. Ct. 1.

And see:

Ashwander v. Tenn Valley Auth., 297 U. S. 288; 56 S. Ct. 466.

U. S. v. West Virginia, 295 U. S. 463; 55 S. Ct. 789.

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 241; 57 S. Ct. 461, 464.

California v. San Pablo & T. R. Co., 149 U. S. 308; 13 S. Ct. 876.

Ex Parte Levitt, 302 U. S. 633, 634; 58 St. Ct. 1; 82 L. Ed. 493.

Tyler v. Judges of Court of Reg., 179 U. S. 405, 406; 21 S. Ct. 206; 45 L. Ed. 252.

Southern Ry. Co. v. King, 217 U. S. 524, 534; 30 S. Ct. 594; 54 L. Ed. 868.

Newman v. U. S., 238 U. S. 537, 549, 550; 35 S. Ct. 881; 59 L. Ed. 1446.

Fairchild v. Hughes, 258 U. S. 126; 42 S. Ct. 274; 66 L. Ed. 499.

Massachusetts v. Mellon, 262 U. S. 447, 448; 43 S. Ct. 597, 601; 67 L. Ed. 1078.

New Jersey v. Sargent, 269 U. S. 328; 46 S. Ct. 122.

Electric Bond & Share Co. v. Sec. Exch. Comm., 303 U. S. 419; 58 S. Ct. 678.

John P. Agnew & Co. v. Haage, 99 Fed. (2d) 349.

Southern Pacific Co. v. McAdoo, 82 Fed. (2d) 121.
Bettis v. Patterson Ballogh Corp., 16 Fed. Supp. 455.

Bogus Motor Co. v. Omerdonk, 9 Fed. Supp. 950.

Holt v. Custer County (Mont.), 243 Pac. 811.

Miller v. Miller (Tenn.), 261 S. W. 965.

Garden City News v. Hurst (Kan.), 282 Pac. 720.

State Ex. rel La Follette v. Damman (Wis.), 264 N. W. 627.

Washington Beauty College v. Huse (Wash.), 80 Pac. (2d) 403.

Oregon etc. Assoc. v. White (Ore.), 78 Pac. (2d) 572.

Washington-Detroit Theatre Co. v. Moore (Mich.), 229 N. W. 618.

Burton v. Durham Realty Co., 188 N. C. 473; 125 S. E. 3.

It can hardly be doubted that if this action were *brought* by Conway in his individual capacity it must be dismissed because, as to the question of the constitutionality of the law or the official duties it may impose upon the Attorney General, he, in his individual capacity, "has merely a general interest common to all members of the public," and such an interest is not sufficient to invoke the jurisdiction of the courts of the United States. By what magic is he, as a defendant, clothed with an interest which he does not have as a plaintiff?

But plaintiff contends the Supreme Court in effect has held in *Ex Parte Young, supra,* and other similar cases, that the interest necessary to sustain jurisdiction does exist in the defendant.

The rule adopted in *Ex Parte Young* and similar cases has no application here. In those cases the subject matter

of the action was the *individual act or threatened act* of the defendant. The question before the Court was whether or not the individual action or threatened action of the defendant was rightful or wrongful and should be enjoined. In determining that question, and *incidental* thereto, the constitutionality of a statute was brought in question. But it was the individual act or threatened *act* which was the *subject matter* of the suit and not the constitutionality of the statute.

> "Petitioner does not deny that a suit nominally against individuals, but restraining or otherwise affecting their action as state officers, may be in substance a suit against the state, which the Constitution forbids, (citing cases) or that generally suits to restrain *action* of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States." (Italics ours.)
>
> *Worcester County Trust Co. v. Riley*, 58 S. Ct. 185, 302 U. S. 292.

It goes without question that a defendant has an interest individually in a suit which involves his individual action.

Here the subject matter of the suit is the constitutionality of the Arizona Train-Limit Law. In the jurisdictional paragraph of its complaint (R. 4) plaintiff alleges that the suit is to obtain a final judgment declaring the Arizona Train-Limit Law unconstitutional. In that question the defendant has no interest. In its brief plaintiff concedes no controversy on this question is presented by the record (R. 21, 23).

But plaintiff *here* contends that a controversy is presented as to the powers and duties of the defendant with respect to the enforcement of the law. Such a question, if presented by the pleadings, would relate to Conway in his official capacity and not to the defendant, Conway, in his

individual capacity. No one, at least not the defendant, has ever contended that Conway in his individual capacity has any power or authority of enforcing the law. On the contrary, Conway has disclaimed such power or authority (R. 47). Any question, then, as to power or authority of enforcement under the law must relate to the official capacity. The defendant, Conway the individual, has no interest in the powers or duties of Conway the official.

And in *Ex Parte Young* and similar cases *some act* or *threat* by the defendant was held necessary as the subject matter of the suit in order to give jurisdiction.

> "The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, *and who threaten and are about to commence proceedings*, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action." (Italics ours.)
>
> *Ex Parte Young, supra.*

And see *Champlin Refining Co. v. Corp. Comm.*, 286 U. S. 210, 238; 52 S. Ct. 559, 566, wherein the Court denied an injunction as to Section 9 of the Oklahoma Petroleum Act for want of jurisdiction for the reason that the plaintiff had failed to sustain the burden of showing some act or threat by the defendant to enforce.

> *Worcester County Trust Co. v. Riley*, 302 U. S. 292; 58 S. Ct. 185.

Plaintiff concedes that there had been no act or threat of prosecution by the defendant prior to April 19, 1940 (Appellant's Brief, 53). The action here before the Court was filed in the District Court April 18, 1939 (R. 45). There was then—when this action was filed—an absolute

want of jurisdiction in the District Court to *enjoin* the defendant.

Ex Parte Young, supra.

Champlin Refining Co. v. Corp. Comm., supra.

It follows that plaintiff's argument that jurisdiction lies to enter a declaratory judgment in any suit where an injunction could be entered, is meaningless and without application.

Not only is there an entire lack of evidence of any act or threat by this defendant, but the evidence is uncontradicted that the defendant consistently in the Trial Court denied any power or duty in him to enforce the Train-Limit Law if unconstitutional and admitted its unconstitutionality. In other words, he denied any power or authority existed in him to enforce the law.

And finally we submit that no question as to the powers or duties of enforcement is presented for decision by the complaint. The allegation of the jurisdictional paragraph of the complaint is that the suit is for a judgment declaring the Train-Limit Law unconstitutional (R. 4) and no issue as to the power or duty of enforcement is presented.

The case of *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace,* 288 U. S. 249; 53 S. Ct. 345; is cited by plaintiff as a case on all fours with the instant case.

The *Wallace case* was a suit brought in the state court under the Tennessee Declaratory Judgment Act to determine the constitutionality of a Tennessee statute imposing an excise tax on the storage of gasoline. The *Wallace case differs* from the case before this Court in at least two important particulars:

(a) The statute imposed an immediate liability for the tax and a duty on the officers to enforce. Thus

a definite and concrete controversy was presented, while no violation of the Train-Limit Law having occurred only an abstract or hypothetical case is presented here.

(b) In the *Wallace case* the defendants were the state officers upon whom the power and duty of enforcing the tax was imposed by the statute and were sued in their *official capacity*. As the representative of the state upon whom the duty of enforcement was imposed, they had an interest in their *official* capacity which would be affected by the determination of the constitutionality of the statute. Here the defendant in his individual capacity—the capacity in which he is sued—has no interest which will be affected by the determination of the constitutionality of the Train-Limit Law.

In *Aetna v. Haworth, supra,* the defendant, as an insured, claimed a *present* right against the insurance company under a policy of insurance. The right or liability claimed was definite and concrete and the determination of his rights under the policy definitely affected his interest.

Likewise in the patent infringement cases the claim was of a present liability for infringement—a definite and concrete controversy—and the rights and interest of the parties were affected by the determination of the question of infringement.

The several other cases cited by plaintiff fall into one of the foregoing class or type.

3. THE ACTION IS AGAINST THE STATE OF ARIZONA AND BARRED BY THE ELEVENTH AMENDMENT TO THE CONSTITUTION.

(Specification of Error Nos. 2 to 7 incl.)

In *Ex Parte Young, supra,* the defendant was stripped of his official character and subjected in his person to the consequences of his individual conduct.

Here the plaintiff seeks to make a reverse application of the doctrine of *Ex Parte Young.*

For the purpose of providing an interest in the defendant sufficient to invoke the jurisdiction of the court the plaintiff seeks to clothe the defendant Conway—sued in his individual capacity—with his official or representative character and subject him individually to the consequences of such official character.

The plaintiff argues that the defendant has an interest and will be affected by a determination of the constitutionality of the Train-Limit Law and the powers and duties of the Attorney General thereunder because upon the defendant as Attorney General exclusively is imposed the power and duty of enforcement. (And plaintiff assigns as error the failure of the Trial Court to find, irrespective of defendant's beliefs or admissions that the law is unconstitutional and imposed no duty upon him, that it is his *official* duty to enforce the law until it is judicially declared invalid. Specification of Error No. 3.)

But the power and duty imposed by the act is upon the Attorney General—Conway in his official capacity and as representative of the State—and not upon the defendant in his individual capacity, the capacity in which he is here sued.

When it becomes necessary, as here, to clothe the defendant with his official and representative capacity in

order to create an interest in him sufficient to sustain the jurisdiction of the Court, the suit becomes one against the State and is barred by the Eleventh Amendment to the Constitution of the United States.

Worcester County Trust Co. v. Riley, 302 U. S. 292; 58 S. Ct. 185.

Ex Parte Young, supra.

As we have heretofore pointed out, the presumption that an act is constitutional is merely a rule of statutory construction—a rule of evidence—and has no application to the duties of an officer under an act. He is not bound by such presumption to accept the law as constitutional and act under it. On the contrary, in performing the duties imposed upon him under a statute the officer acts at his peril. If he acts under an unconstitutional law, he is personally liable for his acts.

Norton v. Shelby Co., 118 U. S. 425; 6 S. Ct. 1121.

Norwood v. Goldsmith, 168 Ala. 224; 53 So. 84.

Dennison Mfg. Co. v. Wright, 156 Ga. 789; 120 S. E. 120.

Highway Commrs. v. Bloomington, 253 Ill. 164; 97 N. E. 280.

Saratoga etc. Waters Corp. v. Pratt, 227 N. Y. 429; 125 N. E. 834.

Cartwright v. Canode, 106 Tex. 502; 171 S. W. 696.

It must follow that if he is personally liable for acting under an unconstitutional act he may, if he considers the law unconstitutional, refuse to incur the liability.

Ex Parte Young, and cases following it, have held that an officer who purports to act under an unconstitutional act is acting in his individual capacity and is doing an individual wrong. If such doctrine is sound, it must follow

that he has the right to determine whether or not he shall commit such wrong. If he has no discretion—no right to exercise his own judgment—then his acts are by reason of his office and the suit would be against the State.

In one breath it is argued, following the doctrine of *Ex Parte Young*, that if the law is unconstitutional an officer in enforcing it is doing an act which he had no legal right to do. And in the next breath, that the presumption of unconstitutionality imposes a legal duty upon the officer to enforce the law—that is, to do an act which the Supreme Court in *Ex Parte Young*, and cases following it, has said he has "no legal right to do." Clearly a contention without merit.

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4. THE MOTION TO REMAND WAS PROPERLY DENIED.

Reference is made by the plaintiff to the matter presented by its motion to remand and defendant's response, and plaintiff contends that if a doubt existed as to defendant's interest, such doubt is now removed (R. 83).

(a) The matter sought to be presented by supplemental complaint has no relevancy to the question raised by the original record.

This appeal and the question as to whether or not a case or controversy is presented must be determined upon the facts and situation existing when the action was filed.

Minneapolis & St. L. R. Co. v. Peoria P. U. R. Co., 270 U. S. 580; 46 S. Ct. 402.

Mullen v. Torrance, 9 Wheat. 537; 6 L. Ed. 154.

Anderson v. Watt, 138 U. S. 694; 11 S. Ct. 449.

National Cash Reg. Co. v. Stoltz, 135 Fed. 534.

Plaintiff in its brief has several times stated that the defendant asserts and contends that he has the power and duty of prosecution under the law (R. 23, 31, 33, 46, 50). These statements are directly contrary to the facts appearing in the record.

In his Affidavit in Support of Motion to Dismiss, his answer, and in his deposition the defendant denied that he had any power or duty of enforcement in his individual capacity, and denied that, in his official capacity, he had any power or duty of enforcement if the law is unconstitutional. He alleged that, so far as he knew, there had been no violation of the law and no occasion for him to investigate as to its constitutionality. And that he had made no study, investigation or examination into the quesion of the constitutionality of the law and had formulated no opinion as to its constitutionality or unconstitutionality. In his answer he further alleged that in his individual capacity, the capacity in which he was sued, he had no interest in the determination of the question of the constitutionality of the law and therefore admitted the allegaions of the complaint as to the invalidity of the law.

At the Pre-Trial Conference, he, in effect, admitted the law is unconstitutional and denied any duty to enforce an unconstitutional law.

Such record wholly refutes these statements made by plaintiff.

This suit was filed on the 18th day of April, 1939. The record is uncontradicted that there was no act or threat on the part of the defendant to enforce the law prior to April 19, 1940.

This suit is entirely unlike *Ex Parte Young* and similar cases because:

(a) Since there had been no act or threat by the defendant, the individual action of the defendant could

not be the subject matter of the suit, and no such action is alleged by the complaint.

(b) In *Ex Parte Young* the liability was immediate and by reason of the threat of enforcement the controversy was definite and concrete, while here, there having been no violation of the law and no threat of enforcement, the controversy, if any, is abstract and hypothetical.

The judgment was entered in the Trial Court on February 14, 1940 (R. 116). The first violation of the Train-Limit Law occurred April 4, 1940 (Exhibit, attached to plaintiff's Motion to Remand), nearly two months after the judgment was entered below. Until such violation occurred the law, if constitutional, imposed no duty of enforcement upon the defendant and no duty nor necessity of investigating as to its constitutionality. Neither his oath of office nor the laws of the State of Arizona require the Attorney General upon taking office to investigate and announce his opinion upon the validity of the many laws with respect to which duties are imposed upon him. It is only when occasion has arisen which would require the exercise of his duties that the necessity arises for him to formulate his opinion and judgment as to the constitutionality of the law.

The action by the State of Arizona to enforce the law was filed in the state court on the 19th day of April, 1940, some two weeks after the violation. That the Attorney General, an occasion having arisen calling for the exercise of his duties if the law is valid, examined into its constitutionality, formulated his opinion, and, some two weeks after the violation, filed an action on behalf of the State to enforce the law, is no evidence whatever to contradict the record that at the time this suit was filed and when judgment was entered, there had been no act or threat on

the part of the defendant to enforce the law, and is entirely irrelevant and immaterial upon the question of whether or not a case or controversy existed when the suit was filed.

It has no material bearing upon the question of whether or not a controversy existed when the action was filed; it in no way confirms the action sought to be pleaded; it cures no jurisdictional defect; it in no way establishes or tends to establish the claim or intention of defendant at the time the action was filed and before a violation.

(b) The situation presented by the Motion to Remand and response thereto shows the jurisdictional amount is not involved.

From the matter appearing in plaintiff's Motion to Remand, and defendant's response thereto, it is seen that the action filed in the state court covers two violations. Under the Train-Limit Law, if valid, the total penalty which could be imposed is $1,000 for each violation, or a total of $2,000 for the two violations alleged in that complaint. From defendant's response it will be seen that an order was entered by the state court staying all other proceedings pendings the determination of that action. Also that the defendant has stated under oath that he will not prosecute any other actions pending the determination of that action, and then only if the law is held constitutional. The action places no restriction upon the length, kind or character of trains the plaintiff operates. It may do as it pleases.

It is clear from the foregoing that if any controversy *now* exists between plaintiff and defendant the amount involved is limited to $2,000, the penalties for the violations charged.

The bringing of any further actions is contingent upon the law being held constitutional, presenting only an abstract or hypothetical situation. And the defendant has

denied an intention to prosecute further violations if the law is held unconstitutional. He cannot as to further violations be charged, then, with threatening an individual wrong.

The penalty of $2,000 being less than the amount necessary for federal jurisdiction, the suit would be dismissed immediately upon such matters appearing.

Healy v. Ratta, 292 U. S. 263; 54 S. Ct. 700.

Washington etc. Co. v. District, 146 U. S. 227; 13 S. Ct. 64.

Holt v. Indiana Mfg. Co., 176 U. S. 68; 20 S. Ct. 272.

Citizens Bank v. Cannon, 164 U. S. 319; 17 S. Ct. 89.

(c) The situation presented by the Motion to Remand and response thereto shows a want of equity jurisdiction.

An action under the Declaratory Judgment Act is an equitable action.

Lumberman's etc. Co. v. McIver, 27 Fed. Supp. 702.

Ohio Cas. Ins. Co. v. Plummer, 13 Fed. Supp. 169.

A stay order having been entered, there can be no grounds for equitable relief and the facts presented show a want of equity jurisdiction.

Champlin Refining Co. v. Corp. Comm., supra.

To avoid repetition in the record, we incorporate herein by reference in opposition to the Motion to Remand the argument and authorities presented in our memorandum filed in opposition to the Motion to Remand.

CONCLUSION

There is not presented here a case in which the defendant is attempting to prevent the determination of the question of the constitutionality of the Train-Limit Law in a proper action within the jurisdiction of the Court brought against a proper party having an interest in the determination of the question.

The defendant is seeking to protect his elemental rights as an individual and citizen that he may not be brought into court charged and adjudged guilty of committing an individual wrong when his only wrong, if wrong it be, is that he was elected and qualified as Attorney General of the State of Arizona; that he be not held *personally liable* in a judgment against him for costs in an action in which he has no personal interest; and that he not be subjected to the *personal burden and expense* of defending the constitutionality of an act which he has never undertaken or threatened to enforce.

He is seeking to defend his individual rights against the dangerous proposition advocated by the plaintiff that one who qualifies as a state officer assumes *personally and in his individual capacity* the responsibility and financial expense of defending the constitutionality of *every state law* the enforcement of which is imposed upon his office.

We are constrained to agree with plaintiff that the case presents an unusual situation, but we do not agree that the "fallacious pretense," to which plaintiff refers, is on the part of the defendant.

We cannot believe that any Court will approve the proposition that the constitutionality of a state law may be determined in an action against an officer in his individual capacity merely because the duty of enforcement is imposed in his office. To do so would be, in effect, to reduce to

ex parte hearings suits to determine the constitutionality of action by the highest legislative body of a state.

We respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

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No. 9474

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

12

SOUTHERN PACIFIC COMPANY,
(a corporation),
Appellant,

vs.

JOE CONWAY,
Appellee.

APPELLANT'S REPLY BRIEF.

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Subject Index

Table of Authorities Cited

Cases

Text

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APPELLANT'S REPLY BRIEF.

(The parties are designated as in the trial Court, and the other briefs in this court; i.e., Appellant as Plaintiff; Appellee as Defendant.)

Appellee's (Defendant's) brief contains but little not already presented at earlier stages of the case, and therefore largely anticipated in our opening brief. Consequently, this reply will be devoted principally to pointing out what appear to us to be errors and omissions in his discussion, with reference to those portions of our opening brief where his major contentions are reviewed at greater length.

Defendant's brief, pp. 1-2.

The complaint herein does not, as defendant asserts, seek merely a declaration "that the Train Limit Law

is unconstitutional". It also asks that the statute be declared "unenforceable" (prayer of complaint; R. 44). This purpose is likewise particularly stated in paragraphs II-c (R. 4), and XIV (R. 36) of the complaint. It is also made clear therein (pars. II-e, XV; R. 5, 39-40) that the suit relates to the rights, *powers* and *duties* of the parties. Such powers and duties, so far as concerns defendant, have to do solely with the enforcement of the Law.

We stress this point at the outset because defendant makes similar statements, at various other places in his brief (e. g., pp. 10-11, 25), and indeed predicates much of his argument thereon. Defendant has simply overlooked the plain language and clear intendments of the complaint.

Defendant's brief, pp. 5-8.

The record of the pre-trial conference (R. 75-76) shows that defendant *admitted* that the Constitution and Laws of Arizona confer upon him exclusive power and duty to enforce the Train Limit Law (as alleged in par. I-b of the complaint), "but in the case of a constitutional law." He now says that because he elsewhere admitted that the law is void, he has in effect *denied* paragraph I-b, and was therefore properly shown as having done so in the "corrected" pre-trial order. Defendant thus treats his confession of unconstitutionality (openly repudiated less than six months later) as a *final* determination, which prevents him from exercising or claiming any power or duty under the Law; and pointedly ignores both his own

statement (R. 140) that the law's validity is for the courts, not for him, to determine, and the authorities (our opening brief, pp. 26-29) which establish that the courts alone have such power, and that his own official opinion, however solemnly announced, is merely advisory.

Defendant's admission, far from being viewed as a denial, should be regarded as if he had said:

> "I admit that the Law, if valid, imposes the duty of prosecution on me; and while you (plaintiff) say that the Law is void, and I am inclined to agree, neither your opinion nor mine is effective. The courts alone can effectively determine that the Law is void."

As anticipated (our brief, p. 37), defendant seeks to sustain the trial court's action in amending the original pre-trial order so as to show that defendant had *denied* (instead of admitted) an essential part of paragraph XVI of the complaint (when in fact "the whole of 16" was admitted, R. 90), by claiming that the admission was inadvertent and unintentional. This claim is clearly without substance. If defendant's counsel were really inadvertent, they should have realized that fact within a reasonable time after pre-trial conference, and thereupon made appropriate motion to reopen the conference or correct the *record*. They made no such motion; they do not even now assert that the stenographic record of the conference is not correct, as printed in the transcript. Examination of that transcript shows that the admission was deliberately and openly made, in response to a question

from the court in which counsel were virtually invited to state whether they desired to specify that any part of the paragraph should be regarded as denied. For the court asked:

"16, *the whole of 16,* is admitted?"

and counsel replied:

"Is admitted, yes." (R. 90; emphasis ours.)

It is immaterial that the portion of paragraph XVI, which the amended pre-trial order shows as denied, resembles other allegations of the complaint which defendant also assertedly denied. As stated above, defendant in fact admitted (with the qualification "in the case of a constitutional law") the corresponding allegation of paragraph I-b, though denying a somewhat similar allegation in paragraph XV. The pre-trial *record* thus showed *two* admissions, and *one* denial of allegations relating to defendant's claim to be vested with the power and duty of enforcement. The admissions are entirely consistent with defendant's oral statements, on deposition, that he "had no doubt" that he must enforce the law if constitutional, in the event of violation (R. 132); that the determination of constitutionality was "up to the courts", not to him (R. 140); that it is and will be his official duty to prosecute "if it (the law) is violated", even though doubtful of validity (R. 141).

Incidentally, defendant did not, *in his deposition,* anywhere deny that he claimed that the law imposed upon him the duty of prosecution, but on the contrary,

expressly agreed that the official duty would arise in the event of violation (R. 141); and he did not hesitate to undertake that "duty" almost at once, i. e., within fifteen days (see defendant's brief, pp. 30-31), from the time a violation of the law assertedly took place. Compare plaintiff's motion to remand, and defendant's response thereto, both now part of this Court's record herein.

Where a pre-trial order controls the subsequent proceedings (as here, under Rule 16 of the Federal Rules of Civil Procedure) it should reflect, and not contradict, the unchallenged record of the pre-trial conference. The lower court's pre-trial order, as modified with respect to paragraphs I-b and XVI of the complaint, was clearly erroneous; and since the changes resulted in serious and manifest injury to plaintiff, they should be disregarded, and the original order (R. 92-93) accepted as controlling.

Defendant's brief, pp. 9, 10.

Although the record in the trial court shows that the parties agree upon the abstract question of the constitutionality of the challenged law, it does not follow (as defendant asserts: brief, p. 10), that no finding or conclusion on that point may or should be entered. The question of validity is committed to the determination of the courts, not the parties; and such determination is essential, in order to dispose of the actual controversy between the parties relating to the power and duty of enforcement claimed by defendant: a power and duty admittedly created by the Law if

constitutional, which defendant has never disclaimed, and which, within less than ten weeks from the date of the trial court's judgment, he did attempt to exercise, in spite of his supposed prior admission of invalidity.

Defendant's brief, pp. 10-16.

Defendant states (brief, p. 11) that "he has never claimed the power or duty to enforce the Train Limit Law"; and again contends that by admitting its invalidity and denying any duty to enforce an invalid law, he has denied having any duty or power to enforce this particular law. We have noted that the same contention is made elsewhere in the brief, in much the same language (e. g., at pp. 4, 8, 12, 16 and 25). It was also anticipated in our opening brief: see pages 29 and following thereof.

We repeat that the statement and contention are erroneous, in the light of the pre-trial record (R. 75-76, 90, in particular) and defendant's deposition (R. 132, 140-141), and because based upon the false premise that defendant's own personal determination of the question of validity is final and thus entirely sufficient. We mention the point again only to make certain that it does not pass unchallenged.

The essential facts are that defendant not only admitted that, having taken his oath of office, he had no doubt that he must enforce the Train Limit Law, if constitutional (R. 132); he also went further, and declared that he never had announced, and never would announce, that he would refrain from enforce-

ment (R. 141). Of course he would make no such announcement; and subsequent events have proved that he had determined to prosecute at once in the event of violation.

Defendant argues that the Supreme Court's opinion in *Ex Parte LaPrade,* 289 U. S. 444, 77 L. ed. 1311, holds that the statutory imposition of the duty of enforcement, though coupled with a formal taking of an oath to perform the duty, does not constitute a *threat* (brief, pp. 14-15). Plaintiff does not depend, in this case, upon any allegation or showing of *threat;* none is necessary in a suit for a declaratory judgment.

N. C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249 (at p. 264), 77 L. ed. 730;

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227 (at p. 241), 81 L. ed. 617;

Gully v. Interstate Natural Gas Co., 82 F. (2d) 145 (149).

We do contend, however, in harmony with the *LaPrade* opinion, that when defendant has admitted: (1) that he has taken the official oath, (2) that the oath calls upon him to enforce the law if valid, (3) that he cannot himself finally determine its validity, (4) that he has the official duty to prosecute even though doubtful of validity, and (5) that he has never disclaimed or disavowed the intention to prosecute and says that he never will; and when all this is reenforced by defendant's exceedingly prompt action when a violation was reported: then there can be no doubt that defendant has *in fact,* by statement and conduct, asserted throughout the course of this case the claim of

an existing power and duty of enforcement, which he fully intended from the first to exercise when occasion arose.

It is immaterial whether, as defendant suggests (brief, p. 14), plaintiff contends that defendant was under obligation to disavow the intention to enforce. While the *LaPrade* opinion certainly carries such an intendment, the fact remains that even though defendant might, as he now argues, have refused to state his position when asked, he did not do so; but instead declared (R. 141) that he *never* would avail himself of the opportunity of avoiding official duty which the *LaPrade* opinion appears to afford.

Defendant refers (brief, p. 16) to the "negative order" cases cited in our opening brief (at pp. 62-67); i. e., the *Rochester Telephone case,* 307 U. S. 125, and *Perkins v. Elg,* 307 U. S. 325; but it is particularly noteworthy that he does not deny that his action—or alleged "inaction"—in the present case has been designed to prevent plaintiff from obtaining, in a Federal court, any relief from the admittedly invalid restraints of the Law. The whole course of his conduct demonstrates that such was precisely his purpose.

Defendant also cites (p. 16) certain decisions to support the point that where a defendant files a disclaimer, or admits the contentions of plaintiff, thus tendering no issue, the case must be dismissed without further proceedings, for lack of controversy. The principle relied upon has no application here. Defendant's answer was not a disclaimer; in fact, as to

many of the major allegations it was in effect a denial under Rule 8(b), in that he claimed to have no information or knowledge sufficient to form a belief. Compare paragraphs VIII, X, XII to XXI, inclusive, XXIII and XXIV of his answer (R. 56-65, 68-70). Apart from these averments, however, the answer sufficiently challenged and denied, in particular, plaintiff's allegation that defendant claimed and maintained the right and duty of prosecution under the Law; and for that reason it was necessary to go to trial to determine the issue.

It will be noted that defendant, even though regarded as having stipulated to the correctness of most if not all of the allegations of basic facts respecting the Train Limit Law, as set forth in the complaint, never admitted outright that the Law conferred no power or duty upon his office, and was therefore unenforceable; the most that he said was that the law, *if invalid as claimed by plaintiff,* conferred no such power. Since defendant could not himself effectively determine that the Law was unconstitutional, and its constitutionality is presumed until the opposite has been determined by competent court decision, his answer is in these respects equivalent to a claim that the power and duty of enforcement continue, and the Law is to be enforced until its invalidity be determined. The subsequent trial record (i. e., defendant's deposition) established sufficiently that defendant did claim the right and power of enforcement; and the prosecution commenced by him on April 19, 1940, demonstrates that fact beyond question. It is wholly incor-

rect to say (defendant's brief, p. 16) that defendant has *at all times* admitted that the Law is invalid, and asserted that no duty of enforcement was imposed.

Defendant's brief, pp. 16-20.

In this portion of defendant's brief, he reviews the record again, and contends that since there is no showing of any *act* or *threat* by defendant to enforce the Law, or indeed of any violations which would lead to such action, the question of defendant's power and duty, even if there were opposing claims duly advanced, is and would be purely abstract and hypothetical.

We emphasize again, as in our opening brief, that this argument is essentially the same as the view adopted by the Eighth Circuit Court of Appeals in *Aetna Life Ins. Co. v. Haworth,* 84 F. (2d) 695; and we invite the Court's attention to that opinion (quoted in part in our opening brief, Appx., p. iii), showing that that court cited and relied upon many of the same cases now cited by defendant to support his present contention.

The Supreme Court's reversal of the Circuit Court's decision in the *Aetna Case* has swept away the very foundation of defendant's argument. The Supreme Court held that a showing of *threat* is not necessary, in a declaratory-judgment suit; that where parties having interests in the subject matter present opposing claims, which are so ripened as to permit of a definitive decree which will settle the issue, a sufficient controversy for purposes of a declaratory judg-

ment is presented, even though no irreparable injury is threatened, and no injunction is sought.

Defendant argues, however, that a judgment or decree entered upon this record, even assuming that the parties present opposing claims, would be purely advisory, applying to a *hypothetical* future situation *which might never arise.* The fact is that the situation actually *did* arise; prosecution was not only threatened, but undertaken, within two months and five days from the date of the decree of the trial Court herein.

To save repetition, we ask the Court to refer to pages 44 and following of our opening brief, in which this portion of defendant's argument (having been made before, and therefore fully anticipated) is further analyzed and refuted.

Defendant's brief, pp. 20-29.

This portion of defendant's brief is an attempt to meet the argument at pages 67-85 of our opening brief, and to show that defendant has no interest in the subject matter; or, of he has, that it can be ascribed to him solely by reason of his official status. The argument is thus largely a repetition of that found in subdivision IV (pp. 9-14) of his memorandum in opposition to our motion to remand. It is based upon two essential premises, both of them unsound: (1) that the complaint involves only the abstract question of the law's validity, and that defendant's powers and duties are not in issue; and (2) that Mr. Conway, the individual who occupies the

office of Attorney-General, is wholly distinct from Mr. Conway, the Attorney-General, and that his acts or actions in his official capacity can have no relation to his individual position.

The first premise has already been sufficiently discussed. As to the second, we refer the Court to the argument at pages 69 and following of our opening brief, with the following additional comment:

The contention (defendant's brief, pp. 21-22) is presented that Mr. Conway, as an individual, could not bring the present action, because of lack of individual interest; therefore, it is said, he cannot be made defendant herein. But the question is not whether defendant could bring *this particular* action; but whether he can, as an individual, be a party to a controversy, in *any* action involving the Train Limit Law, or its enforceability. To that question the decision in *Ex Parte Young,* 209 U. S. 123, furnishes the conclusive answer. Defendant, though purporting or claiming to act as Attorney-General, can unquestionably sue plaintiff to enforce the law in the event of violation (as he has actually done); but if the law be invalid, as defendant in this suit has confessed, then he is really acting only as an individual. Defendant can also, without suing, merely threaten to prosecute if a violation is committed; and again, if the law be invalid, he is still only an individual, acting under color of the office, and still subject to suit in that capacity. As the Supreme Court said, in the *Young Case* (209 U. S. 123, at pp. 157-161):

> "The fact that the state officer by virtue of his office has some connection with the enforcement of the act is the important and material fact * * *
>
> "If the act which the state attorney general seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct * * *
>
> "His (the Attorney General's) power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States Circuit Court."

In:

> *Worcester County Trust Co. v. Riley,* 302 U. S. 292,

a case much relied upon by defendant, the Court said (at p. 297):

> "The Eleventh Amendment * * * does not preclude suits against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer."

Defendant asserts that the doctrine of the *Young Case* is inapplicable, because, so he says, the essence of the action there was the act or threatened act of the defendant official; whereas no act or threat by defendant is involved here. Apart from the fact that defendant has now not only threatened, but acted, this

argument simply ignores the language of the *Young Case,* above quoted, establishing that a state officer, sued as an individual, is by his official connection with the enforcement of a statute, and apart from any threat, sufficiently made a proper party to a suit in which that statute and his power to enforce it are challenged; and also disregards the pronouncements, in the *Aetna* and *Wallace Cases,* that in a declaratory suit, where no injunction is sought (precisely the situation here), a showing of impending irreparable injury (i. e., of a threat, which would be subject to injunction) is not required, as a prerequisite to a justiciable controversy.

The opinion in the *Worcester Case* clearly does not sustain defendant's argument. There the plaintiff was seeking to enjoin certain state officials from undertaking to collect a tax; and the Supreme Court held that it was not made to appear that their contemplated action involved any breach of the Federal Constitution. Since they were acting within the scope of official authority, the suit was held to be against the state and therefore barred by the Eleventh Amendment; but as noted above, the propriety of a suit to restrain an individual, acting or claiming to act under color of an invalid state law, was expressly recognized.

The claim is made that an interest in the subject matter can be conferred upon defendant only if the suit be considered as brought against him officially (defendant's brief, p. 28), because he has taken no individual action. This argument is an ingenious at-

tempt to avoid the effect of the ruling in the *Young Case;* but it is doomed to failure for two reasons: first, because it ignores the realities; and second, because it misconstrues the language of the Young opinion. As to the first, defendant simply forgets that he is the occupant of the office of Attorney General; that he has taken the oath; that he has admitted that he is duty bound to prosecute in the event of violation, even though doubtful of the law's validity; that he has stated that he had never announced and never would announce that he would refrain from performing that duty; and, most of all, that he took prompt action to prosecute plaintiff when occasion arose. Defendant has thus exercised the election of which he speaks (brief, pp. 28-29), and demonstrated, if proof be needed, that as the individual occupying the state office he now has and has always had an interest in the subject matter. As to the second, the opinion speaks for itself; but we ask the Court also to review the discussion at pages 70-84 of our opening brief.

Defendant's brief, pp. 29-33.

The argument in opposition to plaintiff's motion to remand, in this portion of the brief, presents substantially nothing not heretofore considered, and requires no extended comment.

Defendant makes a peculiar argument; for on pages 29 to 31, inclusive, under point (a), he asserts that his action of filing suit against plaintiff on April 19, 1940, has no relevancy whatever to the question whether a controversy existed on April 18, 1939, when

the instant suit was commenced, and contends in effect that the state court suit is to be entirely dissociated from the present proceeding; whereas on pages 32 and 33, under point (b), he treats the two proceedings as being virtually one and the same, because he contends that the value of the amount in controversy here must be measured by the amount of the recovery sought in the other case. Of course, these two contentions cannot both be true; and in fact, neither is even approximately correct.

Certainly the state court suit cannot be wholly dissociated from the present suit. The fact that there had been no act committed or threat made by defendant prior to April 19, 1940, is not controlling; for the existence of an actual controversy between plaintiff and defendant does not depend upon a showing of threat made or action taken. It is noteworthy that defendant does not effectively challenge our contention that his action on April 19, 1940, demonstrates his "state of mind", as it has existed throughout the case, and thus corroborates the conclusion which, we assert, is properly to be drawn from his prior admissions and statements: namely, that he has continuously claimed to be vested with the power and duty of enforcement.

On the other hand, the two suits are by no means identical. This action was not, as defendant seems to believe, brought for the purpose of restraining the state prosecution. No *injunction* is sought to prevent the threatened collection of the penalties claimed to be due. Whatever may be the rule as to the amount in controversy in an action where the purpose is to

enjoin the collection or threatened collection of a tax, fee, or license exacted for the privilege of doing business, that rule has no application here. This is a suit involving the constitutional existence of a claimed power to enforce a restrictive statute, and thus essentially the validity of that statute. In such a suit, the right to carry on the business free of the restriction or, otherwise stated, the injury done to the business, because of enforced compliance with the restriction, is the matter in controversy; and the value of the right or injury is the measure of the value or amount in controversy. In the leading case upon which defendant relies: *Healy v. Ratta,* 292 U. S. 263, the Supreme Court (at p. 269) drew the essential distinction between a suit involving an attempt to enjoin collection of a tax or fee, and one in which the challenge is directed to a statutory prohibition enforceable by prosecution.

We call attention further to the fact that, as stated in our opening brief (pp. 95-96), the value of the right sought to be established by the present suit, and thus of the amount in controversy, has been admitted and conceded by defendant to be greatly in excess of the jurisdictional amount (R. 82-84).

Defendant's final point (brief, p. 33) is that the instant case is an equitable action, and that no grounds for equitable relief now exist because a stay order has been entered in the state case. The point is without merit. Defendant again simply confuses the instant case with the state prosecution, assuming that this suit may be regarded as one to enjoin defendant from proceeding in the state court. Such is not its

stated purpose; and it is immaterial that further state prosecutions are not immediately threatened. Moreover, this Court has recently held that a suit for a declaratory judgment is *sui generis,* and not necessarily either legal or equitable in character.

Pacific Indemnity Co. v. McDonald, 107 F. (2d) 446 (448).

Compare, also,

Borchard on Declaratory Judgments, p. 120.

CONCLUSION.

As pointed out in our initial brief (pp. 83-84) whatever position defendant chooses to adopt, he cannot avoid the fact that an actual controversy exists and has existed herein from the beginning. The prosecution commenced by him on April 19, 1940, in the name of the state, is merely conclusive evidence; and as such it is now before this Court, as part of this record, by virtue of plaintiff's showing on motion to remand and the admissions of that showing contained in defendant's response. It follows that defendant, if claiming to have acted officially, is really claiming that the law is valid (for only a valid law could confer official status); and in that event his claim squarely controverts plaintiff's claim that the law is void, and confers no power at all. If, on the other hand, defendant continues to admit, for the purposes of *this* case, that the law is void, then his action is purely individual, and he stands as such individual asserting a power which, according to plaintiff's claim, has no legal existence.

Defendant represents himself (brief, p. 34) as an individual whom plaintiff is seeking to have "adjudged guilty of committing an individual wrong". Nothing could be further from the facts. Plaintiff has not sought any injunction, or damages, or even costs against defendant; and although defendant has sued plaintiff in the state court, to enforce a law which he has here said he believes invalid, plaintiff still seeks no coercive relief or damages, but only a declaratory judgment as to whether the law may be enforced in the manner attempted.

The record, particularly as supplemented by our motion and defendant's response, demonstrates that the parties maintain definitely adverse claims respecting a subject matter in which each has a legal interest. All other essential facts having been determined, the judgment should be reversed, and the cause remanded for the entry of judgment as prayed in the complaint; or, if the Court deems that the trial record should be supplemented as proposed by our motion to remand, that motion should be granted.

Dated, San Francisco, California,
August 28, 1940.

Respectfully submitted,
ALEXANDER B. BAKER,
LOUIS B. WHITNEY,
C. W. DURBROW,
HENLEY C. BOOTH,
BURTON MASON,
Attorneys for Appellant.

No. 9492

United States

Circuit Court of Appeals

For the Ninth Circuit.

13

FRANK A. DOUGHERTY,

Appellant,

vs.

JOHN V. LEWIS, Former Collector of Internal Revenue for the First District of California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

NO. 9492

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index **Page**

Index **Page**

Index Page

NAMES AND ADDRESSES OF ATTORNEYS

FAULKNER & O'CONNOR, Esqs.,
1101 Balfour Bldg.,
San Francisco, Calif.,
Attorneys for Plaintiff and Appellant.

FRANK J. HENNESSY, Esq.,
U. S. Attorney, Northern District of California,
Post Office Bldg.,
San Francisco, Calif.,
Attorney for Defendant and Appellee.

In the Southern Division of the United States District Court, for the Northern District of California.

No. 20425 R

Dept.....

FRANK A. DOUGHERTY,
Plaintiff,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue for the First District of California,
Defendant.

COMPLAINT

Plaintiff above named complains of defendant above named and for his cause of action alleges as follows:

I.

That this is a case arising under the laws providing for Internal Revenue, viz., it is an action brought against a former Collector of Internal Revenue by virtue of Sections 3220 and 3226 of the Revised Statutes of the United States, being Sections 1670, 1672 and 1673 of Title 26, U.S.C.A., to recover taxes and interest erroneously or illegally assessed or collected.

II.

That at all of the times herein mentioned plaintiff was and is a citizen of the State of California, a resident of the First Internal District therein and of the Southern Division of the [1*] United States District Court, in and for the Northern District of California.

III.

That at all the times herein mentioned, the defendant was the duly appointed, qualified and acting Collector of United States Internal Revenue for the First District of California in the State of California and in the Southern Division of the Northern District of California, save and except that prior to the filing of this complaint, said defendant resigned as said Collector of United States Internal Revenue for the First District of California.

IV.

That said defendant is a resident of the Southern Division of the United States District Court, in and for the Northern District of California.

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*Page numbering appearing at foot of page of original certified Transcript of Record.

V.

That the said defendant heretofore and on January 15th, 1936, assessed against said plaintiff and others, internal revenue taxes in the sum of $7,773.60 representing taxes on 9,700.8 gallons of distilled spirits, 2,916 proof gallons of alcohol contained in mash.

VI.

That thereafter, and on October 5th, 1936, a warrant of distraint having been issued by defendant against plaintiff, plaintiff entered into an agreement with the defendant whereby moneys coming into the possession of the Spreckles Sugar Company of Salinas, California, as the result of the sale of the 1936 sugar beet crop of plaintiff be turned over to the Collector of Internal Revenue, plaintiff reserving in said agreement that the paying to said defendant of said moneys was under protest and without the waiver in plaintiff to sue for the recovery of such moneys and without admitting any tax liability.

VII.

That in August, 1937, pursuant to said warrant of distraint, [2] and pursuant to said agreement referred to in paragraph VI there was collected by said defendant from the Spreckles Sugar Company at Salinas, California, the sum of $3,557.83 which moneys were the property of plaintiff.

VIII.

That thereafter, and on November 5th, 1937, plaintiff filed with and presented to the defendant a claim for refund of the moneys paid as hereinabove set forth and for abatement of the balance of said taxes assessed.

IX.

That thereafter, and on March 2nd, 1938, the Commissioner of Internal Revenue of the Treasury Department of the United States rejected said claim for refund and abatement; a copy of said claim for refund and abatement and a copy of said notice of rejection are hereto attached and marked, Exhibits "A" and "B", respectively.

X.

That plaintiff is informed and believes, and therefore alleges on such information and belief that the assessment of the Internal Revenue tax as hereinabove referred to was levied against plaintiff under the provisions of Sections 3251 Revised Statutes of the United States, which provides in substance, that every proprietor or possessor of, and every person in any manner interested in the use of any still, distillery or distilling apparatus shall be jointly and severally liable for the tax imposed by law on the distilled spirits produced therefrom and under the provisions of Section 3248 of the Revised Statutes, which provides that such tax shall attach to the operation whether in the mash or separated by distillation.

XI.

That plaintiff is informed and believes, and upon such information and belief alleges that said assessment of internal [3] revenue tax, as herein set forth, was assessed against plaintiff by defendant upon the theory that plaintiff was a proprietor or possessor of, and a person interested in the use of a distillery seized on a part of a ranch situated in the County of Monterey, State of California, on June 3rd, 1935, by agents of the Alcoholic Tax Unit of the Bureau of Internal Revenue.

XII.

That plaintiff alleges that he was not and never had been the proprietor or possessor of said still seized as set forth in paragraph XI, nor was he a person in any manner interested in the use of such still, or distillery or distilling apparatus, and that the said portion of said ranch upon which said still, distillery and distilling apparatus was seized was not the property of said plaintiff, nor was such property under his control or jurisdiction and that he did not in any manner have any interest in the use of such still, distillery or distilling apparatus, and that he was not and is not liable for the internal revenue taxes assessed against him as set forth in paragraph V hereof.

XIII.

Plaintiff alleges that the sum of $3,557.83 seized and collected by defendant from plaintiff, as alleged

in paragraph VII hereof, was wrongfully and erroneously seized and collected by defendant for the reason that plaintiff was not liable for the internal revenue taxes assessed against him as set forth in paragraph V hereof.

Wherefore, because of the premises, plaintiff prays that he have judgment against defendant for the sum of $3,557.83, interest thereon, as provided by law, costs of suit herein and such other relief as may be proper and just.

FRANK A. DOUGHERTY
Plaintiff.

FAULKNER & O'CONNOR
Attorneys for Plaintiff. [4]

Northern District of California
State of California
County of Monterey—ss.

Frank A. Dougherty, being first duly sworn, deposes and says:

That he is the plaintiff in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters stated therein on information and belief and as to those matters he believes it to be true.

FRANK A. DOUGHERTY

Subscribed and sworn to before me this 14th day of April, 1938.

[Seal] MARGERY PALMTAG
Notary Public in and for the County of Monterey, State of California. [5]

EXHIBIT A

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Collector's Stamp
(Date received)
Received
Nov 26 1937

( ) Refund of Tax Illegally Collected.

( ) Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

( ) Abatement or Tax Assessed (not applicable to estate or income taxes).

State of California
County of Monterey—ss:

Name of taxpayer or purchaser of stamps Frank A. Dougherty.

Business address (Street) Rt. 1, Box 292, (City) Salinas, (State) California.

Residence.....

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed San Francisco, California. November, 34.

2. Period (if for income tax, make separate form for each taxable year) from Distilled Spirits Tax—Special Tax, 19....., to....., 19.....

3. Character of assessment or tax 7,773.60—$3,557.83 (explanation attached).

4. Amount of assessment, $.....; dates of payment.....

5. Date stamps were purchased from the Government..... 3,557.83

6. Amount to be refunded ($7,773.60) $ all

7. Amount to be abated (not applicable to income or estate taxes) 1433 $.....

8. The time within which this claim may be legally filed expires, under Section Title 26, U. S. C. A. of the Revenue Act of 19....., on August 14, 1941.

The deponent verily believes that this claim should be allowed for the following reasons:

Claimant for abatement and refund herein bases his claim for such abatement and refund upon the following facts:

Claimant was in the years 1934 and 1935 the lessee of a certain ranch situated in the County of Monterey, State of California, comprising approximately 1500 acres.

Upon this ranch claimant raises cattle and raised and harvested sugar beets. During this same period, claimant also operated upon said ranch what is known as a United States Army Stallion

Station under assignment from the United States Army.

Claimant has farmed this ranch under lease for many years prior to the year 1934. The fee to the ranch is owned by Robert Fatjo, a banker residing in the Town of Santa Clara, Santa Clara County, California.

Sometime during the month of October, 1934, three men, Bianchini, Biagi and one Angelo Rodni went to the Dougherty ranch and sub-leased from the claimant, Frank A. Dougherty, some twenty acres of the ranch which Dougherty had under lease from Fatjo. These twenty acres were leased at a rental of $400.00 for a period of one year.

The claimant, Dougherty, was informed by the persons who leased this acreage that the acreage was to be used for the raising of chickens. Included in this subleased acreage was a horse barn and corral which was adjacent to the farm residence of the claimant.

On June 3rd, 1935, certain agents of the Alcoholic Tax Unit of the Internal Revenue Service went to the subleased acreage herein referred to and there found an alcoholic still in operation. They arrested certain persons in the vicinity of the still. They thereafter went to the farm residence of the claimant, Dougherty, and placed him under arrest. Thereafter, the Federal Grand Jury for the Northern District of California returned an indictment at San Francisco, charging the claimant Dougherty, and Dante Brunza, Angelo Rodni, Guiseppe Quinto,

George Harrison, [7] Guiseppe Biagi and Guillo Bianchini, in seven counts, with violation of Title 26, U.S.C.A., Sections 281, 282, 284, 306, 307, and a conspiracy to violate the above mentioned sections of the Internal Revenue Laws with respect to illicit distilling, (Title 18, Section 88, U.S.C.A.).

Thereafter, in the latter part of January, 1936, all apprehended defendants, with the exception of the claimant, having pleaded guilty, the indictment was called for trial before the Honorable Michael J. Roche sitting in the Northern District of California, Southern Division, after a trial by a jury, and on January 31st, 1936, the claimant Dougherty was found not guilty on all counts of the indictment.

On January 15th, 1936, the Collector of Internal Revenue at San Francisco, California served upon claimant Dougherty notice and demand for tax.

That said note is dated January 15th, 1936, and under the column "Name and Address", appears the following:

"Dougherty Frank A	Case 3814-M
Rt 1 Box 292	List Nov 1935
Salinas Calif	Page 515—3"

Under the column "Items", there appears the words:

"5832 00
1941 60"

Under the column "Paid", nothing appears;

Under the column "Assessments", appears
"7773 60"

Under the column "Description", appears the following:

"Distilled Spirits
Tax on 2916 P Gal Mash
Tax on 970 8 P Gal Alc
November 1934"

Thereafter, and on March 30th, 1936, there was filed in the office of the County Recorder of the County of Monterey, State of California, notice of tax lien under Internal Revenue Laws which notice [8] is indexed in the said County Recorder's office as No. 27488 and a copy of which notice is in words and figures, as follows:

"Form 668
Revised Oct. 1928
Treasury Department
Internal Revenue Service

NOTICE OF TAX LIEN UNDER
INTERNAL REVENUE LAWS

No. 85-1936

United States Internal Revenue,
First District of California

March 28, 1936

Pursuant to the provisions of Section 3186 of the Revised statutes of the United States, as amended by Section 613 of the Revenue Act of 1928 (Act of May 29, 1928, 45 Stat., 875),

notice is hereby given that there have been assessed under the Internal Revenue Laws of the United States against the following named taxpayer, taxes (including penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statute the amount of said taxes, together with interest, penalties, and costs that may accrue in addition thereto, is a lien in favor of the United States upon all property and rights and property belonging to said taxpayer, to-wit:

Name of tax payer Frank A. Dougherty,

Residence or place of business Rt. #1, Box 292, Salinas, Calif.,

Nature of tax Distilled Spirits—Special tax

Taxable period Nov. 1934

Amount of tax assessed.....$7773.60

5% Pen..... 388.68

Additional (penalty) tax assessed.....$

Interest from date of notice until date of payment.....

Date assessment list received.....

1935—Nov. page 515: Line 3-4-5.

JOHN V. LEWIS,

Collector.

CERTIFICATE OF OFFICER AUTHORIZED BY LAW TO TAKE ACKNOWLEDGMENTS. [9]

State of California
County of Monterey—ss.

On this day personally appeared before me a notary public in and for the state and county aforesaid, John V. Lewis, (Official title) Collector of Internal Revenue for the First District of California, to me well known as the person who executed the foregoing instrument, and acknowledged that he executed the same for the purposes therein expressed.

In Witness Whereof I have hereunto set my hand and official seal, this the 28th day of March, 1936.

[Seal] A. B. READING
Notary Public, in and for the County of Alameda, State of California.

My commission expires 8/27/36.

To Recorder of Monterey County,
Salinas, Calif.,

Indexed No. 27488
United States Collector of Internal Revenue
Mar. 30, 1936
at 30 min. past 8 AM
in Vol.....of Official Records
Page.....Monterey County.
John E. Wallace, Recorder
by E. Wallace, Deputy."

In the harvesting of sugar beets in the area where claimant's leased ranch was situated, it had

been the practice for the Spreckles Sugar Company to advance to the ranchers the necessary funds with which to harvest the sugar beets. Thereafter, the sugar beets were delivered to the Spreckles Sugar Company who would deduct the money advanced by [10] them and pay over to the ranchers the sale price of the sugar beet crop.

During the harvest time of 1936, because of the fact that notice of the tax lien had been served on the Spreckles Sugar Company, the Company refused to advance the moneys necessary to harvest the crop of claimant without a clearance for their protection from the Collector of Internal Revenue. To obviate this situation, the claimant delivered to the Collector of Internal Revenue at San Francisco, on or about October 5th, 1936, an agreement to the effect that the Spreckles Sugar Company could advance the moneys necessary for the harvesting of sugar beet crop and that after delivery of the crop to the Sugar Company, the proceeds of the crop, less the advance made by the Sugar Company, should be delivered to the Collector of Internal Revenue. This direction to the Collector of Internal Revenue reserved in the claimant any right he may have had to protest the levy of the tax or the payment thereof. Said direction to the Collector of Internal Revenue is in words and figures as follows:

"October 5, 1936.

To Hon. John V. Lewis,
Collector of Internal Revenue,
Federal Office Building,
San Francisco, California.

Dear Sir:

The undersigned, Frank Dougherty, hereby consents that any moneys now in the hands of, or to come into the hands of the Spreckels Sugar Company at Salinas, as the result of the sale of his present 1936 sugar beet crop be turned over to the Collector of Internal Revenue, after deducting the necessary expenses for the harvesting of said crop.

By this consent, the undersigned does not waive his right to protest the assessment and/or collection of those certain taxes covered by warrant of distraint heretofore issued against him by the Bureau of Internal Revenue, nor does he hereby waive any rights he may have to sue for the recovery of any such moneys seized by the Collector of Internal Revenue, as a result of said warrant of distraint, nor does he, in any wise, by the execution of this instrument, admit the tax liability described in said warrant of distraint.

FRANK DOUGHERTY. [11]

State of California,
County of Monterey—ss.

On this 5th day of October, in the year One Thousand Nine Hundred and thirty-six before me, J. T. Harrington, a Notary Public, in and for the County of Monterey, personally appeared Frank Dougherty, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office in the County of Monterey, State of California, the day and year in this certificate first above written.

[Seal] J. T. HARRINGTON,
Notary Public in and for the County of Monterey, State of California."

As a result of this direction to the Collector of Internal Revenue, the Spreckles Sugar Company turned over to the Collector the sum of $3,557.83. This amount is the amount claimant here prays the refund and abatement of. He also asks abatement of the balance of the assessment in the sum of $4,215.77.

It is the contention of the claimant that there is no tax liability on him for the mash and alcohol alleged to have been produced on that part of the ranch which he had leased to other persons.

Claimant contends—

(1) That he had no knowledge that an illicit distillery was being conducted on the said ranch;

(2) That under the provisions of Title 26, U.S. C.A., Section 1150, Subdivision 6 (d) persons liable for tax on distilled spirits are "every proprietor or possessor of, and every person in any manner interested in the use of any still, distillery or apparatus"; that claimant was not a proprietor or possessor, or a person interested in any manner in the use of a still, distillery or distilling apparatus situated on the portion of the ranch that he had subleased, and therefore, could not [12] be liable for any tax on the mash or distilled spirits produced;

(3) That even though claimant could be found to have had knowledge that the illicit distillery was being operated on the premises he had subleased, unless he was a proprietor, a possessor or a person interested in the use of such still, distillery or distilling apparatus, there would be no tax liability upon him. The fact that he received rent from the operators of the illicit distillery would not render him liable for the tax due on such illicit distilled spirits. It is the contention of claimant that the language in Section 1150, Title 26, U.S.C.A., Subdivision 6 (d)—"every person in any manner interested in the use of" means a direct interest in the business and not merely an indirect interest in the success of a business as belonging to other persons.

Therefore, the rent received by claimant would not be such an interest in the use of the still, distillery or distilling apparatus as would render him liable for the tax on mash and spirits produced; and

(4) That claimant was tried in the United States District Court upon all charges involving the operation of an illicit distillery that could be pressed against him and was by a jury found not guilty of all such charges. [13]

FRANK A. DOUGHERTY

Signed .....

.....

Sworn to and subscribed before me this 5th day of November, 1937.

[Seal] MARGERY PALMTAG,
Notary Public
Monterey County Notary Public
(Title)

(Reverse Side Not Filled In) [6]

EXHIBIT B

Treasury Department
Washington
[Seal]
Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to
AT:T:CSA
Cl. No. DS-107898

Mar. 2, 1938

Mr. Frank A. Dougherty,
Route No. 1, Box 292,
Salinas, California.

Sir:

Your claim for refund of $3,557.83, and abatement of an outstanding assessment in the amount of $4,215.77, has been considered.

It appears that an assessment in the amount of $7,773.60, representing tax on 970.8 gallons of distilled spirits and 2,916 proof gallons of alcohol contained in mash, was made against you and others on the Distilled Spirits List for November 1935, page 515, line 3, for the First Collection District of California. It further appears that the amount of $3,557.83 was paid by you in August, 1937.

You request refund of the amount paid, and abatement of the outstanding assessment in the

amount of $4,215.77, based on your statement that the land on which the still was located had been leased to other persons and that you had no knowledge that an illegal distillery was being operated thereon.

Section 3251, Revised Statutes, provides that every proprietor or possessor of, and every person in any manner interested in the use of any still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom, [14] and Section 3248, Revised Statutes, provides that the tax shall attach to the spirits whether in the mash or separated by distillation.

The records on file in this office disclose that you had such interest in the distillery in question as to make you liable under the sections of law referred to above to the tax on the spirits seized. Your claim, is therefore, rejected.

Payment of the outstanding assessment in the amount of $4,215.77 should be made to the Collector of Internal Revenue at San Francisco, California, together with penalty and any interest which may have accrued.

By direction of the Commissioner of Internal Revenue:

Respectfully,
STEWART BERKSHIRE,
Deputy Commissioner.

By Registered Mail imt.

[Endorsed]: Filed May 4, 1938. [15]

[Title of District Court and Cause.]

ANSWER

Defendant admits the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the complaint and denies each and every other allegation contained in the complaint.

Wherefore the defendant demands:

1. That the plaintiff take nothing by reason of his action;

2. That the defendant be hence dismissed with his costs of suit herein incurred;

3. Such other and further relief as may seem to this court just and equitable in the premises.

FRANK J. HENNESSY,
United States Attorney,
Attorney for Defendant.

(Admission of Service)

[Endorsed]: Filed Mar. 15, 1939. [16]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 8th day of August, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

This cause having been heretofore tried and submitted, being now fully considered, and the Court having filed its Memorandum Opinion thereon, it is, in accordance with said Memorandum Opinion, Ordered that judgment be entered herein in favor of the defendant and against the plaintiff, upon findings of fact and conclusions of law to be prepared by the attorney for the defendant in accordance with Rule 42 of this Court, and that the defendant recover the costs of this action. [17]

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, District Judge:

This is a civil action against a Collector of Internal Revenue for the recovery of taxes and interest paid under protest by plaintiff. The defendant, hereafter called the Collector, relies upon section 3251 of the Revised Statutes of the United States (26 U.S.C.A. 1150(d), for his assessment and collection of taxes and interest from plaintiff. The applicable portion of section 3251 reads as follows:

> "Every proprietor or possessor of, and every person in any manner interested in the use of, any still, distillery or distilling apparatus shall

be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom."

Plaintiff, the lessee of a sixteen hundred acre ranch, in 1934 sublet twenty acres on the south west side of his residence to certain individuals, who utilized a barn on the rented property—and within 200 feet of plaintiff's house—for the illegal operation of a still. At the trial, a written agreement was submitted in evidence to show that the sublessees were to pay plaintiff an annual [18] rental of $400.00; but testimony was likewise produced by the parties to the agreement that plaintiff was to receive $125.00 per month for the use of his premises. Furthermore, proof was presented to show that plaintiff was fully aware of the use to which his property was being put and that he permitted such use despite its illegality. In 1935 the sublessees were apprehended for their violation of the internal revenue laws on plaintiff's premises. The Collector, upon discovering the relationship of plaintiff to the liquor traffic, invoked section 3251 of the Revenue Act, quoted above, and assessed him for the distilled spirits produced on his leased property. Plaintiff denied, and continues to deny, liability. The Collector, while not urging that plaintiff is a "proprietor or possessor of" a still, contends that he is a person interested in the use of a still, distillery or distilling apparatus. Evidence at the trial was limited to this single issue.

The question before the court is this: Has plaintiff, through his conduct and relationship with men engaged in the operation of a still on plaintiff's premises, shown himself to be "in any manner interested in the use of any still"?

Section 3251 of the Revised Statutes of the United States was made a part of the revenue laws in order to prevent fraud against the government. It is to be construed so as to accomplish the intention of the legislature (U. S. v. Wolters (S. D. Cal. 1891) 46 F. 509, 510). When the internal revenue laws were passed in 1868, Congress deemed it advisable to make liable persons other than proprietors and possessors of stills in order to curb completely the illicit liquor business. Hence the inclusions of "every person in any manner interested". The cases construing this language are few in number. Decisions, such as U. S. v. Wolters, above, which hold that stockholders of corpora-
[19] tions are "interested", do not assist the court in the problem now before it, nor does the state ruling in Brown v. State (Ark. 1923) 255 S. W. 878, which holds that an intermediary to a liquor transaction is "interested"—unless plaintiff's acquiescence and negative activities on the premises can be said to make him an intermediary. (U. S. v. Dellaro, (1938) 99 F2d 781, holds that acquiescence does not make such an individual a criminal accessory, but is merely indicative of an interest.)

The only ruling on a set of facts which come

close to paralleling those in the case at bar may be found in the jury trial of United States v. Van Slyke (1878) 28 F. Cas. 363, No. 16,610. In the Van Slyke case the owner of premises used for the distillation of liquor was being sued for taxes. Under these circumstances the court instructed the jury that the interest of a secret partner was necessary before the defendant might be held liable. Such an instruction appears to set too high a standard for the government to comply with in order to make section 3251 workable in the case at bar. Yet it may have been justified under the facts of the Van Slyke case, for it appears from the report that the defendant may have had no knowledge of what was going on, but was merely acting as a landlord. In speaking of the importance of knowledge on the part of the defendant and its affect on "interest" the court instructed the jury:

> "But his knowledge, if he had such knowledge, that the distillery was being run contrary to law and that the taxes were not being paid, and his conduct in relation thereto, are all to be considered as part of the evidence in this case, and it is for you to say how far they bear upon the question of his interest in the distillery business."

Such language, when taken with the original standards set by the court, would indicate that profit taking, with knowledge of the source of the profits,

constitutes the taker a man with the kind of interest required by section [20] 3251 of the Revised Statutes of the United States, and that such a man would be liable for taxes. In the case before the court, the issue of secret partnership has not been raised, but ample proof has been presented to show that the plaintiff was well aware of the source of his rental, and that he clearly benefited by reason of his interest in the enterprise. A review of all the evidence on the subject of rental payments convinces the court that the amount received by plaintiff far exceeded the sum which might be earned in a legitimate farming enterprise. Plaintiff's knowledge, plus his monetary compensation for permitting the liquor business to be operated on his premises, together give rise to an interest in plaintiff within the meaning of the language contained in section 3251.

Upon due consideration of the entire case, the court finds that plaintiff is not entitled to recover taxes and interest paid under protest. Judgment will be entered in favor of the Collector, together with the costs of this action.

August 8, 1939.

MICHAEL J. ROCHE
United States District Judge

[Endorsed]: Filed Aug. 8, 1939. [21]

[Title of District Court and Cause.]

PLAINTIFF'S PROPOSED AMENDMENTS TO FINDINGS OF FACT AND CONCLUSION OF LAW PROPOSED BY DEFENDANT.

Now comes the plaintiff herein and in pursuance to the rule of Court proposes the following amendments to the findings of fact and conclusions of law heretofore proposed by defendant herein and lodged with the Clerk of the Court herein:

FINDINGS OF FACT

Plaintiff proposes that defendant's proposed findings of fact contained on page 2 of said proposed findings of fact and conclusions of law, beginning with paragraph II, line 20 thereof down to and including page 3, line 28 thereof, be stricken, and in lieu thereof, the following be substituted:

In October, 1934, three men, Biagi, Bianchini and Rodoni [22] and others entered into an agreement to set up the operation of an unregistered, unbonded distillery for the distilling of alcohol with intent to defraud the United States of the internal revenue tax on the alcohol produced. Plaintiff herein, who was the lessee of a certain 1600-acre ranch, subleased to one Rodoni 20 acres of said 1600-acre ranch, the said 20 acres so subleased containing barns and outhouses and that plaintiff subleased said 20 acres for a period of twelve months at a rental of $400.00 for said period of twelve months;

that plaintiff so leased said 20 acres for farming and cattle raising purposes.

That plaintiff received in payment under said sublease the sum of $200.00 in two payments of $100.00 each.

That on June 3rd, 1935, certain agents of the Alcohol Tax Unit of the Internal Revenue Service entered upon said subleased 20 acres and found therein an unlicensed and unregistered distillery and the Collector of Internal Revenue thereafter determined that there had been produced in said distillery upon said subleased 20 acres 3,886 proof gallons of alcohol.

That plaintiff was not aware of the use to which the property was intended to be put and did not agree or permit that such property be used for the illicit production of alcohol in violation of the Internal Revenue Laws of the United States.

That plaintiff had no other interest in the 20 acres subleased except that he received therefor the rental agreed upon.

That plaintiff was not financially interested in the still located upon said 20 subleased acres.

CONCLUSIONS OF LAW

Plaintiff proposes that defendant's proposed conclusions of law, contained on page 4 thereof, beginning with paragraph I, line 24 thereof and including therein paragraph II, and paragraphs III

and IV on page 5, be stricken and in place thereof the following conclusions of law be included: [23]

I.

That plaintiff was not a person interested in the use of the still, distillery or distilling apparatus within the meaning of Section 3251 of the Revised Statutes (Section 1150d of Title 26, U.S.C.A.)

II.

That plaintiff was and is not liable for the internal revenue taxes assessed against him.

III.

That the sum of $3,557.83 seized and collected by defendant from plaintiff and wrongfully and incorrectly seized and collected and that plaintiff is entitled to its return with interest as provided by law.

IV.

That the plaintiff is entitled to judgment against defendant in the sum of $3,557.83, together with interest thereon, and for his costs of suit herein incurred.

Dated: August 18th, 1939.

FAULKNER & O'CONNOR
Attorneys for Plaintiff.

[Endorsed]: Lodged 8/18/39. [24]

[Title of District Court and Cause.]

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This cause came on regularly for trial in the above entitled court, the plaintiff Frank A. Dougherty appearing by his attorney James B. O'Connor, and the defendant John V. Lewis appearing and being represented by W. F. Mathewson, Assistant United States Attorney, evidence was adduced by the respective parties and the cause was duly argued by counsel, both orally and upon written Briefs subsequently filed, and the court now being fully advised in the premises finds the following:

FINDINGS OF FACTS

I.

This is an action brought against a former Collector [25] of Internal Revenue by virtue of Sections 3220 and 3226 of the Revised Statutes of the United States, (Sections 1670, 1672, and 1673 of Title 26 USCA), to recover taxes and interest alleged to have been erroneously or illegally assessed or collected. The plaintiff is a citizen of the State of California and a resident of the Southern Division of the United States District Court in and for the Northern District of California. The defendant also is a resident of the Southern Division of the United States District Court in and for the Northern District of California, and was the duly appointed, qualified and acting Collector of the

United States Internal Revenue for the First District of California, in the State of California, and in the Southern Division of the Northern District of California, at the time of the assessment and collection of the taxes. Prior to the filing of the Complaint the defendant resigned as Collector of the United States Internal Revenue for the First District of California.

II.

In October, 1934, three men, Biagi, Bianchini and Rodoni, entered into an agreement to set up and operate an unregistered, unbonded illegal distillery for the production of alcohol with intent to defraud the United States of the Internal Revenue taxes on the alcohol produced. To effectuate this scheme the plaintiff agreed with these three men to permit them to set up the distillery in a barn located upon a portion of a 1600 acre ranch leased by the plaintiff. This agreement was in consideration of the monthly payment to the plaintiff of the sum of $125.00 and upon the condition that these three men would attempt to protect the plaintiff from the criminal and tax liabilities [26] incident to the unlawful still operation. To effectuate this condition of the agreement one of these men signed with a fictitious name and delivered to the plaintiff a document purporting to be a lease for 14 months at a rental of $400 of 20 acres of the plaintiff's leased ranch.

The stated purpose of the purported lease was dry stock feeding.

In October, 1934, the three men in accordance with the agreement set up an unlicensed and unregistered distillery in a barn located on the premises described in the "lease", 200 feet from the plaintiff's residence. This distillery was not operated continuously but was operated in October and November, 1934 and in May, 1935. The production was determined by the Collector of Internal Revenue to be 3886 proof gallons of alcohol. The correctness of this determination and the amount of the tax subsequently assessed was not questioned by plaintiff. The plaintiff received the monthly rental of $125.00 for each of the three months the still was in operation.

The plaintiff was fully aware of the use to which the property was intended to be and was put and agreed to and permitted such use with full knowledge of its illegality. The plaintiff knew the illegal source of his share in the enterprise which in amount far exceeded the sum which might have been earned as rental for the use named in the "lease" or any legitimate farming enterprise, conducted on the "leased" premises.

III.

The defendant on January 15, 1936 assessed against the plaintiff and others Internal Revenue taxes in the sum of $7773.60 representing taxes on

970.8 gallons of distilled [27] spirits and 2916 proof gallons of alcohol contained in mash. On October 5, 1936 a warrant of distraint having been issued by the defendant against the plaintiff, plaintiff entered into an agreement with the defendant whereby money coming in to the possession of the Spreckels Sugar Company of Salinas, California, as a result of the sale of the 1936 beet crop of plaintiff be turned over to the Collector of Internal Revenue. This agreement provided that the payment to the defendant of such money was under protest and without the waiver of plaintiff's right to sue for its recovery and was not an admission of any tax liability. In August 1937 pursuant to the warrant of distraint and such agreement there was collected by the defendant from the Spreckels Sugar Company at Salinas, California, the sum of $3557.83, which money was the property of the plaintiff. On November 5, 1937, plaintiff filed with and presented to the defendant a claim for refund of the money paid and for abatement of the balance of the tax assessed. On March 2, 1938, the Commissioner of Internal Revenue of the Treasury Department of the United States rejected this claim for refund and abatement.

CONCLUSIONS OF LAW

I.

That within the meaning of Section 3251 of the Revised Statutes (Section 1150d of Title 26 United

States Code Annotated) the plaintiff was a person interested in the use of the still, distillery and distilling apparatus;

II.

That the plaintiff was and is liable for the Internal Revenue taxes assessed against him; [28]

III.

That the sum of $3557.83 seized and collected by defendant from plaintiff was rightfully and correctly seized and collected and plaintiff is not entitled to its return;

IV.

That the defendant is entitled to a judgment against plaintiff for his costs of suit herein incurred.

Dated: This 17th day of October, 1939.

MICHAEL J. ROCHE
United States District Judge.

[Endorsed]: Lodged Aug. 14, 1939. Filed Oct. 17, 1939. [29]

In the Southern Division of the United States District Court for the Northern District of California.

No. 20425-R

FRANK A. DOUGHERTY,

Plaintiff,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue for the First District of California,

Defendant.

JUDGMENT ON FINDINGS

This cause having come on regularly for trial upon the 13th day of June, 1939, before the Court sitting without a jury, a trial by jury having been waived by attorneys; Jas. B. O'Connor, J. J. Harrington and William Danielson, Esqrs., appearing as attorneys for plaintiff, and Hon. Frank J. Hennessy, United States Attorney, Wilbur F. Mathewson, and William E. Licking, Esqrs., Assistant United States Attorneys, appearing on behalf of defendant, and the trial having been proceeded with on the 14th day of June, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed, and the cause having been submitted to the Court for consideration and decision; and the Court after due deliberation, having rendered its decision and filed its findings, and

ordered that judgment be entered in favor of defendant and for costs in accordance with said findings:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendant go hereof without day, and that said defendant do have and recover of and from said plaintiff his costs herein expended taxed at $.

Judgment entered this 19th day of October, 1939.

WALTER B. MALING
Clerk.

[Endorsed]: Filed Oct. 19, 1939. [30]

[Title of District Court and Cause.]

NOTICE

To Messrs. Faulkner & O'Connor,
Attorneys at Law,
1101 Balfour Building,
San Francisco, California.

Hon. Frank J. Hennessy,
U. S. Attorney,
Post Office Building,
San Francisco, California.

You Are Hereby Notified that on October 19th, 1939 a Judgment On Findings was entered of rec-

ord in this office in the above entitled case.

WALTER B. MALING,
Clerk.

San Francisco, California. October 19th, 1939.

[31]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR A NEW TRIAL

To the Honorable Frank J. Hennessy, Esq., United States Attorney for the Northern District of California, Attorney for Defendant:

Please take notice that the plaintiff in the above entitled matter has filed herein his motion for a new trial and that the same will be called for hearing before the Honorable Michael J. Roche in his court room situated in the Post Office Building in the City [32] and County of San Francisco, State of California, on Monday, November 6th, 1939 at the hour of ten o'clock A. M. of said day or as soon thereafter as counsel can be heard or at such other day as the said Law and Motion Calendar of said Honorable Michael J. Roche shall be called.

Dated: October 28th, 1939.

FAULKNER & O'CONNOR
Attorneys for Plaintiff.

(Admission of service)

[Endorsed]: Filed Oct. 27, 1939. [33]

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Now comes the plaintiff in the above entitled action and moves the above entitled Court to set aside that certain judgment entered of record in the office of the Clerk of the above entitled Court on October 19th, 1939 in favor of the defendant herein and against plaintiff and to grant plaintiff herein a new trial of the above entitled cause. [34]

This motion for a new trial is made upon the grounds—

I.

That the evidence was insufficient as a matter of law to justify the Court in entering judgment in favor of defendant and against plaintiff.

II.

That the Court erred as a matter of law in holding that plaintiff was within the meaning of Section 3251 of the Revised Statute of the United States (Section 1150d of Title 26, U.S.C.A.) a person interested in the use of the still, distillery and distilling apparatus.

III.

That the Court erred as a matter of law in holding that plaintiff was and is liable for the internal revenue tax assessed against him.

IV.

That the Court erred as a matter of law in holding that the sum of $3,557.83 seized and collected

by defendant from plaintiff was rightfully and correctly seized and collected and in holding that plaintiff was not entitled to its return.

V.

That the Court erred as a matter of law in holding that defendant was entitled to judgment against plaintiff for costs of suit.

Dated: October 28th, 1939.

FAULKNER & O'CONNOR
Attorneys for Plaintiff

Admission of service.

[Endorsed]: Filed Oct. 27, 1939. [35]

[Title of District Court.]

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 27th day of November, in the year of our Lord one thousand nine hundred and thirty-nine.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

Plaintiff's motion for a new trial having been heretofore heard and submitted, being now fully

considered, it is ordered that said motion for new trial be and the same is hereby denied. [36]

[Title of District Court and Cause.]

NOTICE

To Messrs. Faulkner & O'Connor,
1101 Balfour Building,
San Francisco, California.

Hon. Frank J. Hennessy,
U. S. Attorney,
Post Office Building,
San Francisco, California.

You Are Hereby Notified that on November 27th, 1939 Judge Michael J. Roche Ordered that the motion for new trial in the above entitled case be Denied.

WALTER B. MALING,
Clerk. (a)

San Francisco, California. November 27th, 1939.
[37]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To John V. Lewis, former Collector of Internal Revenue for the First District of California, the defendant above named, and to Hon. Frank J. Hennessy, United States Attorney, Attorney for Defendant, Post Office Building, San Francisco, California.

You, and each of you, will please take notice that Frank A. Dougherty, the plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the [38] final judgment and the whole thereof entered in this action on the 19th day of October, 1939.

Dated: January 17, 1940.

FAULKNER & O'CONNOR
Attorneys for Appellant,
Frank A. Dougherty, 1101
Balfour Building,
San Francisco, California [39]

Receipt of a copy of the within Notice of Appeal is hereby admitted this 17th day of January, 1940.

FRANK J. HENNESSY
United States Attorney,
Attorney for Defendant, John
V. Lewis, former Collector of
Internal Revenue for the First
District of California.

[Endorsed]: Filed Jan. 17, 1940. [40]

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by these Presents,

That we, Frank A. Dougherty, as principal... and National Automobile Insurance Company, a body corporate duly incorporated under the laws of the State of California, and authorized to act as surety under the Act of Congress, as sureties, approved August 13, 1894, whose principal office is located in Los Angeles, State of California, are held and firmly bound unto The United States of America in the full and just sum of Two Hundred Fifty ($250.00) dollars, to be paid to the said The United States of America certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of January in the year of our Lord One Thousand Nine Hundred and Forty.

Whereas, lately at a District Court of the United States for the Northern District of California in a suit depending in said Court, between Frank A. Dougherty, plaintiff vs. John V. Lewis, former Collector of Internal Revenue for the First District of California, Defendant, a judgment was rendered against the said Frank A. Dougherty and the said Frank A. Dougherty having filed his notice of appeal having to reverse the.....in the aforesaid

suit, and the notice of appeal to the Circuit Court, having been served on the United States Attorney, Frank J. Hennessy, attorney for defendant.

Now, the condition of the above obligation is such, That if the said Frank A. Dougherty shall prosecute his appeal to effect, and answer his damages and all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "express agreement" summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

Acknowledged before me by the Principal Frank A. Dougherty day and year first above written.

ERNEST E. WILLIAMS
U. S. Commissioner Northern
District of California at S. F.

(Verification)

FRANK A. DOUGHERTY

[Seal] NATIONAL AUTOMOBILE INSURANCE COMPANY

By GEO. W. POULTNEY
Agent and Attorney in Fact

[Endorsed]: Filed Jan. 17, 1940. [41]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that

the Record on Appeal to the Ninth Circuit of the United States Circuit Court of Appeals in the above entitled case shall consist of the complete record and all the proceedings and evidence in the action, subject to the approval of the District Court.

Dated: January 26, 1940.

FAULKNER & O'CONNOR
Attorneys for Frank A. Dougherty
FRANK J. HENNESSY
United States Attorney
By W. F. MATHEWSON
Attorney for John V. Lewis, former Collector of Internal Revenue, etc.

Approved:
MICHAEL J. ROCHE
Judge of the United States District Court.

[Endorsed]: Filed Feb. 8, 1940. [42]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING

Pursuant to Rule 73, Subdivision (g), Rules of Civil Procedure, the time within which the record on appeal in the above entitled action may be filed and within which the action may be docketed in the

United States Circuit Court of Appeals is hereby extended to and including March 28th, 1940.

Dated: February 23, 1940.

MICHAEL J. ROCHE
United States District Judge

[Endorsed]: Filed Feb. 23, 1940. [43]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING

Pursuant to Rule 73, Subdivision (g), Rules of Civil Procedure, the time within which the record on appeal in the above entitled action may be filed and within which the action may be docketed in the United States Circuit Court of Appeals is hereby extended to and including the 14th day of April, 1940.

Dated: March 26, 1940.

MICHAEL J. ROCHE
United States District Judge.

[Endorsed]: Filed Mar. 26, 1940. [44]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR TRANSMISSION OF RECORDS, PROCEEDINGS AND EVIDENCE IN ACCORDANCE WITH RULE 75 OF THE RULES OF CIVIL PROCEDURE.

It is stipulated by and between counsel for the respective parties that the Clerk of this Court, in conformity with Rule 75 of the Rules of Civil Procedure, shall transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, the following designated portions of records, proceedings and evidence in this cause, certifying that those portions thereof that are necessary to be certified pursuant to said rules. All costs thereof to be paid by [45] plaintiff appellant, and that the original reporter's transcript and exhibits be forwarded, pursuant to Rule 75, Subdivision (i) of the Rules of Civil Procedure.

1. Complaint.
2. Answer.
3. Order of August 8, 1939, directing judgment in favor of defendant.
4. Memorandum opinion of Court.
5. Judgment in favor of defendant.
6. Defendant's proposed findings of fact and conclusions of law.
7. Plaintiff's proposed amendments to findings of fact and conclusions of law.
8. Court's findings of fact and conclusions of law.

9. Notice of entry of judgment of findings.

10. Notice of motion for a new trial.

11. Motion for a new trial.

12. Notice of order denying motion for a new trial.

13. Order denying motion for a new trial.

14. Notice of appeal.

15. Cost bond.

16. Stipulations and order re record on appeal.

17. Stipulations and orders enlarging time for filing record on appeal and docketing.

18. This stipulation and order.

19. Original reporter's transcript of evidence of testimony taken at trial.

20. Original exhibits introduced in evidence at trial.

Dated: April ....., 1940.

FAULKNER & O'CONNOR,
JAMES B. O'CONNOR,
Attorneys for Plaintiff.
FRANK J. HENNESSY,
United States Attorney.
By W. F. MATHEWSON,
Assistant United States Atty.,
Attorney for Defendant.

Upon the foregoing stipulation
So ordered:

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Apr. 8, 1940. [46]

[Title of District Court.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 46 pages, numbered from 1 to 46, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case entitled Frank A. Dougherty, plaintiff, vs. John V. Lewis, etc., No. 20425-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $5.40 and that the said amount has been paid to me by the Attorneys for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 9th day of April, A.D. 1940.

[Seal] WALTER B. MALING,
Clerk.

J. P. WELSH,
Deputy Clerk. [47]

[Title of District Court and Cause.]

TESTIMONY

Tuesday, June 13, 1939.

Counsel appearing:

For Plaintiff: Messrs. Faulkner & O'Connor, by James B. O'Connor, Esq.

For Defendant: Wilbur F. Mathewson, Esq., Assistant U. S. Attorney, William E. Licking, Esq., Assistant U. S. Attorney.

Mr. O'Connor: If your Honor please, this is an action by the plaintiff, Frank Dougherty, against John V. Lewis, former Collector of Internal Revenue. The complaint recites that it is a case under the Revenue Laws of assessment of taxes under Section 1670, Title 26, of U.S.C.A., which provides that every proprietor or possessor or person in any manner interested in the use of any still, distillery or distillation apparatus shall be jointly and severally liable for the taxes imposed on the distilled spirits produced therefrom.

The complaint recites that the former Collector of Internal Revenue on October 5, 1936, by virtue of a warrant of distraint issued by him against the plaintiff seized certain properties or moneys belonging to the plaintiff that were then in the possession of the Spreckens Sugar Company, in Salinas; that thereafter, after [49] seizure of these moneys by the Collector, a claim was filed with the Commissioner of Internal Revenue for a refund of

the taxes collected; that this refund was denied by the Commissioner.

The petition then alleges that the plaintiff was not a person liable for the tax by virtue of Section 1150, and that he was not interested in the use of the distillery which was seized on a certain ranch in Monterey County on June 3, 1935.

The Answer of the Government admits all the allegations of the complaint, with the exceptions of paragraphs 12 and 13; is that correct, Mr. Mathewson?

Mr. Mathewson: That is correct.

Mr. O'Connor: So I assume that the sole question here is whether or not this plaintiff was at the time of the seizure of the still referred to in the complaint a proprietor of, a possessor of or person in any manner interested in the use of the still or distilling apparatus.

FRANK A. DOUGHERTY,

the plaintiff; called as a witness in his own behalf; sworn.

The Clerk: Please state your name to the Court.

A. Frank A. Dougherty.

Direct Examination

Mr. O'Connor: Q. Mr. Dougherty, your name is Frank A. Dougherty? A. Yes, sir.

Q. You are the plaintiff in this case; is that correct? A. Yes, sir.

(Testimony of Frank A. Dougherty.)

Q. You were a defendant in the case of United States v. Frank A. Dougherty, et al., No. 25556-R; is that correct? A. Yes, sir.

Q. And you were tried in that case; is that correct? A. Yes, sir.

Q. And you were found not guilty of the charge of possession of a still; is that correct?

A. Yes, sir. [50]

Q. Where do you reside, Mr. Dougherty?

A. In Buena Vista District out from Salinas.

Q. That is in Monterey County?

A. Yes, Monterey County.

Q. How old are you?

A. I am about 55 now, I guess.

Q. How long have you lived in Monterey County? A. All my life.

Q. How long have you lived where you are now living?

A. About 20 years, I should judge; since 1917.

Q. Directing your attention to the years 1934 and 1935, were you living at the place where you now reside during that period of time?

A. Yes.

Q. What is the name of the ranch on which you were living? A. Mr. Bob Fatjo's.

Q. That is the ranch owned by Mr. Robert Fatjo; is that correct? A. Yes.

Q. During the years 1934 and 1935 were you farming that ranch? A. Yes, sir.

(Testimony of Frank A. Dougherty.)

Q. How many acres does that ranch consist of?

A. Practically 1500.

Q. You were farming it by virtue of a lease from Mr. Fatjo; is that correct?

A. No lease, but just verbal between us.

Q. You had an oral lease from year to year; is that correct? A. Yes.

Q. Directing your attention particularly to the month of October, 1934, did you at that time sublease any portion of these premises?

A. I leased to three men.

Q. What did you lease to them?

A. 20 acres.

Q. Where are those 20 acres?

A. They are the east, south side of the place; that would be—I don't know what you would call it.

Q. Now, tell the Court the circumstances under which you leased these premises. Who first came to you and talked to you concerning them?

A. Well, it was Angelo Rodoni. [51]

Q. At that time did you know him by the name of Rodoni? A. No.

Q. What name did you know him by then?

A. Well, he signed the lease as Perolli.

Q. Perolli? A. Yes, sir.

Q. Is this the gentleman, here, Mr. Dougherty?

A. Yes, sir.

Q. That is Mr. Rodoni? A. Yes, sir.

(Testimony of Frank A. Dougherty.)

Q. Whom you knew as Perolli? Is that correct? A. Yes, sir.

Q. Was there anybody else with him at that time? A. Bianchini.

Q. Bianchini, is it? A. Bianchini.

Q. Do you see him in the court-room? Is that the gentleman there? A. Yes.

Q. Was there anyone else with him?

A. Biagi.

Q. Do you see him in the court-room?

A. Over there with a kind of grey sweater.

Q. This gentleman, here? A. Yes.

Q. These three men came to see you sometime during the month of October, 1934; is that correct?

A. Yes.

Q. Did you have a conversation with them at that time?

A. They wanted to lease 20 acres of land.

Q. What 20 acres?

A. The 20 acres with the barn. The fence runs through the center of it. Of that part was hay land and the other part was pasture land.

Q. And that 20 acres also included a horse barn?

A. Horse barn and two buildings.

Q. Two out-houses? A. Yes, sir.

Q. How many horses would that horse barn accommodate, ordinarily?

A. It would hold eight.

(Testimony of Frank A. Dougherty.)

Q. Did it have any storage capacity in addition to that? A. About 30 tons of hay.

Q. Was that baled hay or loose hay?

A. Baled hay. [52]

Q. Did you discuss with them the rent for those 20 acres, including the barn?

A. No; they just said that they would pay me $20 an acre for it.

Q. What was the total rent to be?

A. $400.

Q. Did they pay you any money at that time?

A. They came and talked and then they came back and gave me a hundred dollars.

Q. Did they later come back and have a lease for you to sign? A. They gave me a lease.

Q. At the time that you signed the lease did they pay you any additional money?

A. They paid me a hundred dollars.

Q. They paid you another hundred dollars?

A. When they brought the lease back the lease was wrong.

Q. When they first brought the least to you there was a mistake in the lease, is that correct?

A. Yes.

Q. What was the mistake in the lease?

A. Two miles from town, and it was twelve.

Q. In other words, the description of the ranch from town was incorrect? A. Yes.

Q. Was the lease taken away and returned with that corrected? A. Yes.

(Testimony of Frank A. Dougherty.)

Q. At that time they paid you an additional $100? A. Yes.

Q. I show you this lease and ask you if that is the lease to which you are referring?

A. Yes, sir.

Q. Is that your signature on the lease?

A. Yes, sir.

Mr. O'Connor: I offer this lease in evidence as Plaintiff's Exhibit.

The Court: Let it be marked.

(The document was marked "Plaintiff's Exhibit 1.")

PLAINTIFF'S EXHIBIT No. 1

LEASE
FRANK DOUGHERTY TO
CORANTI PEROLLI

This Indenture made the 23rd day of October one thousand nine hundred and thirty four between Frank Dougherty of Salinas, County of Monterey, State of California, hereinafter called "lessor," and Coranti Perolli of San Jose County of Santa Clara, State of California, hereinafter called "lessee,"

Witnesseth: That the said lessor does by these presents, demise and lease unto the said lessee, and the said lessee does hereby hire and take from the said lessor, Twenty acres on the South West side of the Dougherty place in Salinas Valley situate about 12 miles South West from the town of Salinas with the appurtenances, for the term of Fourteen

(Testimony of Frank A. Dougherty.)
months and seven days from the 23rd day of October one thousand nine hundred and thirty five, at the total rent or sum of Four Hundred dollars, payable in lawful money of the United States of America, in manner following, to wit: Two Hundred Dollars on the delivery of this instrument, and Two Hundred Dollars on May 1st, 1935;

And it is hereby agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein agreed to be kept by the lessee, then it shall be lawful for the said lessor, at his option, to terminate this lease and to reenter the said premises and remove all persons therefrom.

And the said lessee does hereby covenant, promise, and agree to pay to the said lessor the said rent in the manner herein specified, and not to assign this lease, or let or underlet the whole or any part of said premises without the written consent of lessor, and it *it* is further agreed that said leased property will not be used in any, manner or form so as to conflict with any Federal or State laws or any County ordinances, Violation of which will cancel this lease and the lessor will immediately remove all persons therefrom, and that, at the expiration of said term, the said lessee will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit (damages by the elements excepted). Should the lessee hold over the term herein created, such tenancy shall

(Testimony of Frank A. Dougherty.)

be from month to month only, and be on the same terms and conditions as are herein stated

And the said lessor does hereby covenant, promise, and agree that the said lessee paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold, and enjoy the said premises for the term aforesaid.

It is further understood and agreed that all the provisions of this lease shall extend to and be binding upon the heirs and assigns of the lessor and the executors, administrators, and assigns of the lessee.

In Witness Whereof, the said parties to these presents have hereunto set their hands the day and year first above written.

FRANK DOUGHERTY
CORANTI PEROLLI

Signed and Delivered in the Presence of

.....

.....

[Endorsed]: Pltf's Ex. No. 1. Filed June 13, 1939. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Mr. O'Connor: Q. Now, did you receive any further money from them as rental for these premises? A. No, sir. [53]

Q. When were they to pay you the additional $200? A. In the middle of the lease.

(Testimony of Frank A. Dougherty.)

Q. In the middle of the lease. Did they ever pay you that additional $200? A. No, sir.

Q. After you leased the premises to these men did you again have any contact with them?

A. Well, no, I hadn't.

Q. Did you see them?

A. I seen them different times.

Q. Where would you see them?

A. Around the place.

Q. That is, going into the 20 acres?

A. Yes, sir.

Q. How would they enter this 20 acres of land? Where would they enter their 20 acres?

A. On the south corner.

Q. On the south corner?

A. Southeast corner.

Q. Off the river road?

A. Off the river road.

Q. And that river road is a county highway?

A. Yes, sir.

Q. Is there any means by which they could get from the 20 acres that was occupied by them to any portion of the ranch that was occupied by you?

A. That was all fenced off.

Q. That was all fenced off?

A. Yes, sir.

Q. And they did not use the entrance that you used to go from the river road into your premises?

A. No, sir.

(Testimony of Frank A. Dougherty.)

Q. They used a separate entrance of their own?

A. A separate gate.

Q. Directing your attention to the month of June, June 3, 1935, do you recall being arrested upon that occasion by Alcohol Tax Agents of the Department of Internal Revenue?

A. Yes, sir.

Q. When were you arrested, in the day time or night time?

A. Night time, I judge about nine o'clock.

Q. About nine o'clock at night. Were you taken by these agents to the barn that you had leased to these men? A. Yes.

Q. When you got there what did you see?

A. I seen two men sitting in there with an officer and a little black—little light [54] covered with black paper.

Q. What?

A. Light covered with black paper.

Q. What else did you see?

A. Well, I seen the still.

Q. You saw the still. Now, then, prior to the occasion on the night of June 3rd, when you were taken to the barn on this 20 acres, had you any knowledge that there was a still on those premises?

A. That is the first time.

Q. Did you have any interest in the still, itself?

A. No, sir.

Q. Did you ever invest any money in the still?

A. No, sir.

(Testimony of Frank A. Dougherty.)

Q. Did you have any arrangement with either of these three men, or any other person, whereby you were to receive any profits that were made from the operation of that still? A. No, sir.

Q. Did you have any arrangement with these men, or anybody else, whereby you were to pay any of the losses incurred in the operation of this still if such losses were incurred? A. No, sir.

Q. Mr. Dougherty, during this period of time from about October, 1934, until June, 1935, you were actually personally farming part of that property; is that correct? A. Yes, sir.

Q. You, personally, were farming part of that ranch? A. Yes.

Q. Where is the major portion of the tillable or farming land situated? Whereabouts on the ranch is the main portion of your tillable or farming land situated?

A. Oh, it is away over—the grain land is away over on the other side of the ranch. There is about 60 acres in that field.

Q. Is that below the road?

A. No, that is above the road.

Q. That is the grain land?

A. That is the grain land.

Q. Is there some land below the road that you farm?

A. Yes, sir, that is about half a mile from the house.

(Testimony of Frank A. Dougherty.)

Q. What type of farming do you do there—were you doing there at that time?

A. Raised beets, sometimes lettuce, sometimes [55] beans.

Q. Sugar beets? A. Yes, sir.

Q. Or lettuce or beans? A. Yes.

Q. You were actually farming during the period of time from October, 1934 to June, 1935?

A. Yes, sir.

Q. During that period of time what portion of your time would you spend in the fields?

A. Practically all the time.

Q. What time would you arise in the morning?

A. Five o'clock.

Q. And after having your breakfast you would go immediately to the fields? A. Yes.

Q. How long would you remain there?

A. All day, practically.

Q. Would you return to your home for lunch?

A. Sometimes; sometimes not.

Q. Sometimes you would and sometimes you wouldn't. So, practically speaking, you worked from sun-up until sun-down on your farm; is that correct? A. Yes, sir.

Q. In addition to the farming that you did there, did you have at that time and operate at that time a Government remount station? A. Yes.

Q. You had a stallion there? A. Yes, sir.

Q. Under the supervision and direction of the United States Government? A. Yes, sir.

(Testimony of Frank A. Dougherty.)

Q. You still operate that remount station?

A. Yes, sir.

Q. By the way, you were not now a lessee of that ranch, are you? A. No, sir.

Q. You are not farming that ranch?

A. No, sir.

Q. In other words, all you are doing is taking care of this remount station; is that correct?

A. That is all.

Q. By the way, Mr. Dougherty, when you leased these premises, or when these three men came to you and talked about leasing these premises, [56] what did they tell you they wanted the twenty acres for?

A. Wanted it for chickens and dry stock.

Q. For raising chickens and the running of dry stock, is that correct? A. Yes, sir.

Q. Now, sometime during the year of 1935 or 1936 you were served, I assume, or you were advised that there had been served on the Spreckels Sugar Company a warrant of distraint by the Collector of Internal Revenue? A. Yes, sir.

Q. Did you at that time have certain monies due you from the Spreckels Sugar Company?

A. Yes.

Q. They advanced you certain monies to permit you to harvest your crop that year; is that correct?

A. Yes, sir.

Q. Your sugar beet crop was harvested?

A. Yes, sir.

Q. During 1936? A. Yes, sir.

(Testimony of Frank A. Dougherty.)

Q. And the crop was delivered to the Spreckels Sugar Company out of Salinas; is that correct?

A. Yes, sir.

Q. And whatever monies were due you from that crop after deducting expenses of the harvesting which had been advanced to you, were seized by the Collector of Internal Revenue; is that correct?

A. Yes, sir.

Q. You entered into an agreement with the Collector of Internal Revenue at that time, did you not, whereby you turned over what monies were due you under protest; is that correct? A. Yes, sir.

Q. And the amount of money that was collected by the Collector of Internal Revenue at that time was some $3557.83; is that correct?

A. Yes, sir.

Q. And the total amount of the tax that had been assessed against you and the other persons who were involved in the criminal prosecution, United States of America v. Frank A. Dougherty, et al, No. 25556-R—the total amount of tax assessed against you and the other [57] individuals in the case to which I have referred was $7773.40; is that correct?

A. Yes.

Q. Of that amount, there has been collected under protest—— A. Yes, sir.

Q. (Continuing) ——by the Collector some $3557.83; is that correct? A. Yes, sir.

Q. And in addition to the assessment of the taxes in the sum of $7773.60 there was also as-

(Testimony of Frank A. Dougherty.)

sessed against you a penalty in the sum of $388.68; is that correct? A. Yes, sir.

Mr. O'Connor: I think that is all, if your Honor please.

Cross Examination

Mr. Mathewson: Mr. Dougherty, you recall the occasion when you first discussed the leasing of your property to these three men, Bianchini, Biagi and Rodoni?

A. Well, I was down at the remount stable and I seen them up at the house and I went up and seen them.

Q. Did you know any of these three men before you met them on that day? A. No, sir.

Q. You didn't know any one of those men?

A. No, sir.

Q. You were down at the remount station, saw them up at the house, and you went up to meet them? A. Yes, sir.

Q. At that time the men told you they wanted the place to raise chickens and feed dry stock?

A. Yes, sir.

Q. Was the place equipped to feed chickens at that time? A. What?

Q. Was the place equipped to feed chickens at that time? A. Well, just the barn.

Q. Just the barn. Are you familiar with the equipment necessary to raise chickens?

A. Give chickens the run of the place, there; just a common chicken yard.

(Testimony of Frank A. Dougherty.)

Q. At the time you discussed the rental of the property did they tell you what property they wanted?

A. They wanted 20 acres. [58]

Q. Did they say they wanted 20 acres?

A. I told them there was about 20 there.

Q. Did they say they wanted 20 acres or did they point out the area of land they wanted? I say, did they tell you they wanted to rent 20 acres, or did they go on your property and point out the land they wanted to rent?

A. They wanted to rent 20 acres with the barn and the buildings there.

Q. Of the area that you rented to them, how much of it is hay land and how much is pasture land?

A. There is 10 acres fenced; there is a fence runs through the center of it and that on the left is 10 acres of hay land.

Q. Mr. Dougherty, I show you a photograph of a ranch premises and ask you if you recognize the premises depicted in the photograph?

A. Well, this shows most of the back end of it.

Q. Most of the back end of your place?

A. Yes, sir. This was taken the other way.

Q. That photograph is taken from the back of the place looking toward the road, is it?

A. Yes, sir.

Q. Can you point out on the photograph to his Honor the area of land that was rented to these three men in October of 1934?

(Testimony of Frank A. Dougherty.)

A. There is half of it ain't on this photograph.

Q. Will you point out the half that is on there?

A. Just this half; the pasture land, practically all that; not all of it.

Q. I can't see what portions you are pointing out.

(The witness indicates on the photograph.)

The Court: Step up here and point.

A. This portion, here (indicating). This 10 acres out here, this is farm land.

Q. This side of the barn (indicating)?

A. Yes, sir. This is the back part; the fence runs here, right out to the County Road. [59]

Q. Is there ten acres here? A. Yes, sir.

Q. That is what you would call pasture land?

A. Pasture land and there is the fence—you see the fence coming up here (indicating).

Q. Yes.

A. This goes in with this other in a field back of this barn, and that went over that way to that pasture land or to that hay land.

Mr. Mathewson. Q. Will you point out on that photograph your residence?

A. It is over here (indicating). I stayed away over on this side of the house. Mr. Fatjo had this house.

The Court: Q. Who is Mr. Fatjo?

A. Mr. Robert Fatjo, of Santa Clara.

Q. He is the man that owns the place?

A. He owns the place.

(Testimony of Frank A. Dougherty.)

Mr. Mathewson: Q. And that is the barn you rented and is the barn in which the still was found?

A. Yes, sir.

Mr. Mathewson: If your Honor please, I ask that this be marked as Defendant's Exhibit for identification first in order.

The Court: Let it be marked.

(The photograph referred to was marked "Defendant's Exhibit A for identification.")

Mr. Mathewson: Q. What time of day was it that these three men called upon you to rent your property? A. To rent the property?

Q. Yes, what time of day was it?

A. Well, I think it was the afternoon, about——

Q. Sometime in the afternoon?

A. Yes, sir.

Q. Did you discuss with them the amount of the rental?

A. No, they just said that they would give me $20 an acre for it.

Q. $20 an acre for 20 acres of land?

A. Yes, sir.

Q. That included the barn?

A. The barn and two buildings.

Q. Also included the corral? A. Yes.

Q. Did it include water?

A. They had the well. [60]

Q. Did it include any place on the ranch for men to stay?

(Testimony of Frank A. Dougherty.)

A. Not without they had stayed over in those out-buildings, there, at the west—at the east side of the barn.

Q. You did not rent them any other cabins on your place? A. No, sir.

Q. At the time of the renting of the property did they ask you if they could use any other portion of your premises? A. No, sir.

Q. About how much hay can you raise in that pasture land a year?

A. Well, that year there was about 25 ton of hay there, an excellent good crop.

Q. 25 ton of hay? A. Yes.

Q. On the 10 acres? A. Yes, sir.

Q. In the preparation of the lease did you request a written lease? A. No, sir.

Q. Did they offer to give you a written lease?

A. Yes, sir.

Q. They brought the lease to you for your examination before you signed it, did they not?

A. They fetched it to sign it, yes, sir.

Q. Did you examine the lease at that time?

A. I looked at it.

Q. Did you observe in the lease the provision for forfeiture?

A. No, sir, I never read it that close.

Q. You didn't read it that close? A. No.

Q. What portion of the lease did you read?

A. I just took a look at it, and I seen the mileage was wrong on it, and I told them that the mile-

(Testimony of Frank A. Dougherty.)

age was 12 miles and they had it marked 2. And I told them it didn't make any difference, just a short time——

Q. The only thing that you noticed in the lease was that the mileage was wrong?

A. That is all that I noticed—was right there to see.

Q. Did you notice the description of the property leased? A. Just—no.

Q. Did you notice the term of the lease, the length of time it was to run?

A. The terms were supposed to be from November to [61] November, one year; that is all I could lease it.

Q. That is the only period of time for which you leased it?

A. Because I had no right to lease it any different.

Q. And did you ask them to put the forfeiture provision in that lease? A. To do what?

Q. Will you read this provision of the lease (handing paper to witness)?

A. I think so, I read that part, yes, sir.

Q. You read that at the time?

A. Yes, sir.

Q. Did you ask them to put it in the lease?

A. Well, it was in the lease.

Q. It was in the lease when you first saw it?

A. Yes, sir.

(Testimony of Frank A. Dougherty.)

Q. When you discussed the rental of the property did you ask them to put such a provision in the lease they offered to give you?

A. I didn't understand.

Q. Did you ask them to put that in the lease?

A. I told them—I didn't ask them but I told them that part.

Q. You told them you wanted that part in?

A. Yes.

The Court: Read it, so I may follow it, for the purpose of the record.

Mr. Mathewson: The provision reads:

"And it is further agreed that said leased property will not be used in any way or in any manner or form so as to conflict with any federal or state laws or any county ordinances, violation of which will cancel this lease and the lessee will immediately remove all persons therefrom."

Q. You stated that there was a fence running from the corral down to the river road.

A. Yes, sir.

Q. Was there any way to get from the property that you had leased into your place?

A. Well, there is a gate there, but the gate was locked. [62]

Q. The gate was locked? A. Yes.

Q. Was it locked with a padlock?

A. Yes, sir.

Q. Was it your padlock?

A. It was the lock that was there.

(Testimony of Frank A. Dougherty.)

Q. It was the lock that was on the fence?

A. They had the key; I didn't have no key to it.

Q. It was your padlock but they had the key?

A. Yes; it had been there on the fence.

Q. The lease provided for the payment of $200 on the signature of the lease, and $200 on May 1st?

A. When?

Q. On May 1, 1935.

A. They paid $100 between October and November, and then when I got the lease in November they paid the other hundred dollars.

Q. Did the lease provide for the payment of any other money?

A. Half at the half of the year.

Q. How much was to be paid then?

A. $200.

Q. Was that ever paid? A. No, sir.

Q. Did you ever ask them to pay it?

A. Well, the thing was broken up.

Q. The thing was broken up? A. The still.

Q. The thing was broken?

A. I never seen them no more.

Q. On the first of the year—at the middle of the year?

A. The middle of the year, a little after the middle.

Q. The lease provides for the payment of $200 on May 1st. The still was seized on June 3rd?

A. Yes.

Q. Did you ask them for the payment?

(Testimony of Frank A. Dougherty.)

A. I didn't see them.

Q. You didn't see them? A. No, sir.

Q. Had you seen them around the place previous to that? A. No, sir.

Q. Had you seen them at any time during the year of 1935? A. Just in the first part.

Q. Just in the first part of 1935? A. Yes.

[63]

Q. Did you know at that time—did you know at any time that employees of these three men were sleeping on portions of your ranch that you had not leased to them? A. No, sir, I did not.

Q. Where were you at the time you were arrested on June 3 of 1935? A. In the house.

Q. About what time of the evening was it?

A. What time it was?

Q. Yes.

A. About nine o'clock. I was making out a report on the Government stallion.

Q. Isn't it a fact that at the time you were arrested and the agent stated that you were under arrest that you asked, "What for?"

A. No, sir.

Q. "For that over there? I have a lease."

A. No, sir.

Q. You didn't ask that? A. No, sir.

Q. You didn't state that? A. No, sir.

Q. Isn't it a fact that at the time of your arrest the first thing you did was to show them your lease?

A. No, sir.

Q. Did you ever see any of the three men who leased the property around your place in the fall of 1934?

A. Only when I was locked up with them.

Q. Only when you were locked up. I said in the fall of 1934. A. No, sir.

Q. You never saw them around your place?

A. No, sir.

Q. Did you notice any trucks or any cars being driven into your place?

A. Sometimes when I was up plowing in the field I would see a car drive in that portion and drive out.

Q. What time of day or night was that?

A. Well, maybe along about three or four o'clock in the afternoon.

Q. Three or four in the afternoon. Did you ever smell any unusual odors on the place?

A. I did not.

Q. Did you smell any unusual odors on the place? A. No, sir. [64]

Q. Did you hear any unusual sounds coming from the barn? A. No, sir.

Q. Did you ever hear the sound of burners?

A. No, sir.

Q. You stated on your direct examination that these three men, as a part of the lease, were able to use the pump?

Mr. O'Connor: I don't think he stated that on direct examination; he stated that on cross-examination.

(Testimony of Frank A. Dougherty.)

A. The water went with the place.

Mr. Mathewson: Q. The water went with the place, did it, Mr. Dougherty?

A. Yes, that was theirs.

Q. Who was to pay for the power?

A. They paid for the power.

Q. At the time you leased the property to the three men, Bianchini and Biagi and Rodoni, were you receiving and paying for electric power on the ranch? A. Not when they had it.

Q. Before they had it? A. Oh, yes, sir.

Q. You had power? A. Yes, sir.

Q. After you leased the property to these men did they inform you at that time that they would change the power? A. Yes, sir.

Q. That was part of the arrangement?

A. Yes, sir.

Q. That they would apply for the power in their names? A. Yes, sir.

Q. Between the time of the lease and the time the distillery was seized in June, 1935, did you apply for power? A. No, sir.

Q. The power remained in their names from October of 1934 until June of 1935?

Mr. O'Connor: Just a moment. If he knows. I submit it isn't a proper question unless he knows whether it remained in their names, or not. If your Honor please, he asked the question if Mr. Dougherty made any application to change the power from October until June 3, 1935, and he said

(Testimony of Frank A. Dougherty.)

no. Now he asks the question if it remained in their names. How does he know? Perhaps he has no knowledge of that fact. [65]

The Court: Ask him the direct question.

Mr. Mathewson: I will withdraw the question.

Q. You did not apply for power?

A. No, sir.

Q. Between October of 1934 and June of 1935?

A. No, sir.

Q. How much rental do you pay for the property? A. I was paid a hundred dollars.

Mr. O'Connor: I don't think you understand the question, Mr. Dougherty.

Mr. Mathewson: Q. At the time in 1934 you had leased the Fatjo Ranch from Mr. Fatjo.

A. Yes, sir.

Q. That ranch is approximately 1500 acres?

A. Yes, sir.

Q. How much rental did you pay a year?

A. Well, $2000.

Q. You paid $2000 a year? A. Yes, sir.

Q. You said that of the 1500 acres how much of this land was devoted to raising crops?

A. About 150 acres of grain land; that is up in the hills, like; and I guess about 60 acres of beet and beans and lettuce land.

The Court: Q. How many acres in beets did you have in in the year that you sold them?

(Testimony of Frank A. Dougherty.)

A. There was, I think, 30.

Q. What money did the Spreckels people advance to raise that crop? A. How much?

A. They advance money if you ain't got it for seeding them, and then they advance you some money for hauling them, and then they advance you some money for irrigating them.

Q. You had 30 acres. What did that net?

A. Yes, sir.

Q. What did that net? Is this the net, $7000?

A. The net is——

Q. Do you know?

Mr. O'Connor: What was the question, if your Honor please?

The Court: 30 acres in beets. What money was coming from Spreckels without any advances on that 30 acres? [66]

Mr. O'Connor: The credit due on the beets during that period of time for the total acreage was $4311.82.

The Court: What is that $7000?

Mr. O'Connor: The $7000 is the total amount of tax that was assessed against all of these defendants and the sum of $3700 is the amount due him after Spreckels deducted the moneys that they advanced for harvesting that crop.

The Court: All right; proceed.

Mr. Mathewson: Q. You say there was 150 acres in grain and 60 acres in beets, lettuce and chards. What other land did you have?

(Testimony of Frank A. Dougherty.)

A. What other?

Q. Yes.

A. There was a piece of land down on the river bottom, I guess probably 200 acres, that is in the river bed.

Q. That is waste land?

A. Practically all waste land. Some years you can use it; some years you can't.

Q. What other type of property did you have?

A. There is just hills and grazing land.

Q. The balance of those 1500 acres was grazing land?

A. No; there is 1500 acres in the whole ranch.

Q. Other than the 150 acres devoted to grain, 60 acres devoted to beets, and 200 in the bottom land—— A. Yes.

Q. ——the rest of it was grazing land?

A. Grazing land.

Q. What about the area occupied by ranch buildings?

A. Well, you would call that ranch property or farming property.

Q. About how many acres was devoted to that?

A. There was ten acres of hay land, and I guess if they wanted to they could make vegetables there, this side of the windmill, because there is plenty of room there between those oaks right out in front—probably two or three acres, if anybody wanted to do anything with that.

(Testimony of Frank A. Dougherty.)

Q. The 10 acres of hay land that you rented to the three men, Biagi, [67] Bianchini and Rodoni—was that part of the 150 acres of grain land?

A. No; that is right across the place—it is off some—it is a long ways off from the other farm land.

Q. In 1934 and 1935 you were raising beets. Were you raising any hay?

A. Raising any hay?

Q. Yes.

A. I raised hay up on those benches.

Q. Where are the benches?

A. Well, they are away off. There is flat run-off pasture—some call them plateaus—up away over on that side of the ranch; there is one in the center; there is one on the other side of the ranch. There is another—three of them.

Q. Did you have any cattle on the ranch in 1934?

A. I had 48 head of Al Wallace's, 60 head of cattle belonging to Jim Riley, and then I had a lot of horses.

Q. About how many horses did you have?

A. Probably forty or fifty transient horses and about 60 brood mares there for breeding, belonging to different people.

Q. Were the mares pastured there all the time?

A. Yes, sir, while they are being bred.

(Testimony of Frank A. Dougherty.)

Q. How much did you get from Wallace for his cattle? A. For whose?

Q. Wallace.

Mr. O'Connor: I object to this upon the ground that it is incompetent, irrelevant, and immaterial.

Mr. Mathewson: If your Honor please, the materiality is the rental value of this property, which the Government insists is an exorbitant rental value.

Mr. O'Connor: I still submit that it is immaterial under the law whether it is an exorbitant rental or not.

The Court: It is an element. It is remote. I will allow it.

Mr. Mathewson: Q. How much did you receive from Mr. Wallace for pasturing his 48 head of cattle?

A. Well, some years it is— [68] I guess it was 75 cents that year, I ain't sure. When cattle dropped in the market they couldn't pay as much.

Q. It was 75 cents in 1934?

A. Well, I think so.

Q. Did he have the 48 head on your place all the year round? A. He had 48 head.

Q. Were they there all year?

A. They was.

Q. What about the 60 head Riley had there?

A. Riley's was practically—they came in in January and they went out in—oh, I guess—I don't think they went out; I think he fed them on beet

(Testimony of Frank A. Dougherty.)

tops. He fed them on beet tops. They went out way late.

Q. You say he fed them on beet tops and they went out way late?

A. Yes, he sold some of them for beef.

Q. The 75 cents a head that Wallace paid you for his 48 head, was that 75 cents a year?

A. No, sir, a month.

Q. 75 cents a month. How much did Riley pay you for the 60 head? A. 75 cents.

Q. How much did you get for the 40 horses you had on the place?

A. They run that year $2; used to be $3.

Q. $2 a head that year—that is 1934?

A. Yes.

Q. Were there 40 head on the ranch all the year around, all that year?

A. Practically all the year.

Q. And the 60 mares that you had—how long were they there?

A. Well, they run about—well, it depends on the breeding. You keep them until you breed them, maybe two months, maybe three months some of them; I have had mares down there breeding them six months, then they didn't catch.

Q. Did you have 60 head of mares on your ranch all the year around?

A. Well, say about half the year, half the breeding months—six months.

(Testimony of Frank A. Dougherty.)

Q. Did you charge anything for the pasturage?

A. 10 cents a day. [69]

Q. 10 cents a day pasturage? A. Yes, sir.

Q. The only dry stock you had on the place then were Wallace's 48 head and Riley's 60 head?

A. Well, of course, there was a lot of calves with those cows of Riley's.

Q. In the back of your place there is a little arroyo with a barn in it where a man was found at the time the still was seized. Did you ever go to that place?

A. No, sir; I never used that place.

Q. From October of 1934 to June of 1935 did you go out to this house or barn?

A. No, sir.

Q. Did you ever notice whether or not there was a shell and boiler out in that arroyo?

A. Not until after it was knocked over.

Q. Did you ever seen any dry stock or any chickens on the property that you leased to Messrs. Biagi, Bianchini and Rodoni? A. No, sir.

Q. During the period from October 1934 to June 1935 were you leaving for work early every morning and returning late every night?

A. Yes, sir.

Q. What time would you leave the house?

A. Daylight.

Q. What time would you return?

A. Dark.

(Testimony of Frank A. Dougherty.)

Q. Is that true of every morning?

A. Every morning, pretty nearly.

Q. Including Sundays?

A. Well, Sundays, if there was anything to do we have to do it just the same. Where there is stock they have got to be fed.

Q. Daylight—what time of the day is that?

A. Well, take it in the early summer mornings, four o'clock is daylight.

Q. In October of 1934 what time would that be?

A. It was pretty daylight yet along about five—half past four.

Q. When would it become dark?

A. Well, along about seven o'clock.

Q. Daylight lasted in October from about five in the morning until seven at night?

A. Yes, sir. [70]

Q. What about May of 1935? About when would it become light then?

A. I guess practically pretty near the same thing.

Q. About five o'clock in the morning and seven o'clock at night? A. Yes.

Q. During this period of time when you would leave for work, where would you go to work?

A. October?

Q. Yes.

A. Generally working in beans early in the morning. You have to cut them early when it is damp.

(Testimony of Frank A. Dougherty.)

Q. Where were the beans planted at that time?

A. Half a mile away from the place.

Q. That is, half a mile up the river?

A. Yes, sir; on the lower side, toward the river.

Q. Would you stay with the beans all day long?

A. You pile them and you rake them.

Q. I mean, would you stay in the field all day long, or would you come back to get lunch?

A. Come back maybe to get lunch, maybe not; depends on what you have to do. We always generally try to rush it through if we can to keep them from popping open.

Q. Then during October of 1934 you were harvesting beans from seven o'clock in the morning until seven o'clock at night, except for coming back to the ranch occasionally at noon time?

A. Yes. And then we were getting some lettuce land ready, cultivating it, getting it ready to plant an early crop.

Q. Where was that?

A. Just below the same place.

Q. In May of 1935 what were you doing around the ranch then? What work were you doing?

A. May of 1935?

Q. Yes.

A. I guess we were hauling baled hay.

Q. And where were you hauling the hay from?

A. Out from these fields, to put it in the cow barn,—remount barn.

(Testimony of Frank A. Dougherty.)

Q. Did you haul hay down from the fields by the house?

A. Put it [71] into the remount barn to store it.

Q. Did you bring it down by the house?

A. No, sir.

Q. How would you get it down?

A. Came down by the old place, half a mile away, and came out on the County Road.

Q. Half a mile away—that is half a mile up or down the river? A. Down.

Q. Half a mile down the river?

A. Down the road.

Q. Then you would bring it back along the river road to the remount station?

A. Yes, sir.

Q. About how much of the day did you spend harvesting the hay? A. All day.

Q. All day? A. Yes, sir.

Q. Would you come back to the ranch during that period of time—that is, during the day time?

A. Probably to get lunch.

Q. Just for lunch? A. Yes, sir.

Q. Well, then, during October, 1934 and May, 1935 you were working away from the ranch all day long except to return for lunch?

A. Yes, sir.

Q. About how far is the barn that you leased to these men from your residence on the ranch?

A. Well, from where I stayed in the house it is about 250 feet, I think; something like that.

(Testimony of Frank A. Dougherty.)

Q. There is a road, is there not, that runs from the river road past the front of your house into the corral? A. No.

Q. Isn't there a road running from the river road?

A. There is a road runs the north part into my place.

Q. There is a road, then, running from the north gate? A. Yes, toward the town.

Q. Past the front of your house?

A. No. Well, that is the river road.

Q. I am speaking now of the road——

A. That has just been lately. [72]

Q. Just been lately?

A. Yes, that is just lately that that road has been there. It comes in crooked that way. That wasn't there then.

Q. Wasn't there that road in October, 1934?

A. No, sir, there was no road there.

Q. Was there more than one road leading from the river road into your place in October, 1934?

A. Only one.

Q. Only one? A. To the house.

Q. To the house? A. Yes, sir.

Q. There was another to the corral, was there?

A. Sir?

Q. There was another road from the river road to the corral?

A. On the north—south road.

(Testimony of Frank A. Dougherty.)

Q. That was on the south road?

A. Where that big gate is way down. That ran up to the barn that these gentlemen had.

Q. Then there was a north road running from the river road to your house? A. Yes.

Q. How close did that road come to your house?

A. How close? I didn't get that.

Q. How close did that road pass in front of your house? Did it run directly to your house?

A. You mean the river road?

Q. No.

A. The other road runs in to the house. From the river road it runs into the northern part of the house.

Q. Did that road continue through into the corral? A. No, sir.

Q. It ended at your house?

A. Ended at the house.

Q. The only other road into the place was the south road that ran into the corral rented by these three men? A. Yes, sir.

Q. Where did you get your water for your house? A. They furnished it.

Q. They furnished water for your house?

A. Yes, sir.

Q. Is there a tank on the premises?

A. Yes.

Q. Where is the tank located?

A. On a hill. [73]

(Testimony of Frank A. Dougherty.)

Q. Where is the hill with relation to the house?

A. What?

Q. Where is the hill and the tank with relation to your house? A. On the west.

Q. It is on a hill up above your house?

A. Yes, back of the house.

Q. You got your water for the house from that tank? A. Yes.

Q. The water that these men were to use for their dry stock, was that to be obtained from the same tank?

A. Yes, the same thing, or they could get it from the—they could get it from over at the pump.

Q. They could take it directly from the pump?

A. Yes, sir, they had a trough there.

Q. One more thing, Mr. Dougherty. At the time you rented the property to these three men and discussed rental value, the area to be rented, whether or not you would have a lease, didn't one or all of these three men tell you that they intended to use the property for a still? A. No, sir.

Q. Didn't they tell you that they were going to make whiskey there? A. No, sir.

Q. Didn't Rodoni, before he introduced Biagi and Bianchini, ask you if he could use your place to make whiskey? A. No, sir.

Q. Isn't it a fact that the rental that you received was not $400 for the year, but $125 a month?

A. No, sir.

Mr. Mathewson: That is all.

(Testimony of Frank A. Dougherty.)

Redirect Examination.

Mr. O'Connor: Q. Mr. Dougherty, is it an uncommon thing for farmers in that vicinity to rent and farm portions of ranches without there being living quarters on that particular portion?

A. Lot of places.

Q. In other words, a man might live several miles away from where he [74] is farming and come over and farm a particular piece of land that he may rent; is that correct?

A. There is half of the people in Salinas that farm live in town.

Mr. O'Connor: That is all.

The Court: We will take a recess.

(After recess:)

Mr. O'Connor: That is the plaintiff's case, if your Honor please.

ROBERT A. FATJO,

Called as a witness for the Defendant; Sworn.

The Clerk: Q. Please state your full name to the Court. A. Robert A. Fatjo.

Direct Examination.

Mr. Mathewson: Q. Where do you reside, Mr. Fatjo? A. Santa Clara.

Q. Are you the owner of the Fatjo Ranch on the River Road south of Salinas?

A. Yes, sir.

(Testimony of Robert A. Fatjo.)

Q. How many acres are there in that ranch?

A. Well, from the tax receipt it looks about around 1600—1600 acres, from what I can make out.

Q. Calling your attention to 1934 and 1935, was the property leased at that time?

A. It was rented. I don't think we had a lease.

Q. Rented?

A. It was rented. For several years we didn't have any lease, if I remember right. I couldn't find it, anyhow. I looked for it before I came.

Q. To whom was the property rented, do you recollect?

A. It was rented to Dougherty Bros. at first; at that time Frank A. Dougherty.

Q. And Frank A. Dougherty was the renter in 1934 and 1935? [75] A. I think so.

Q. What were the terms of the rental?

A. Two thousand a year at that time.

Q. The rental, then, was from year to year?

A. Yes.

Mr. Mathewson: That is all.

Cross Examination.

Mr. O'Connor: Q. Mr. Fatjo, Dougherty Bros.; and Frank Dougherty later, rented those premises for over a period of a number of years; isn't that correct? A. Since, I think, 1917.

Q. And prior to 1934 Frank Dougherty had been paying a higher rent than $2000 a year; isn't that true? A. Yes.

(Testimony of Robert A. Fatjo.)

Q. At one time he was paying as high as $3600 a year; isn't that correct?

A. I think it was paying $3000 and paying the taxes.

Q. So that would run it better than $3600?

A. Yes, the taxes was around $800.

Q. When times got a little tougher you reduced the rent for him? A. Yes.

Q. Do you recall that sometime during the latter part of October, 1934 at the time that you renewed his lease or renewed his yearly rental of the premises, that he asked you if it would be all right with you if he sub-leased part of the premises for farming purposes? A. Yes, sir.

Q. That is correct, isn't it? A. Yes.

Q. You told him you had no objection?

A. Yes.

Mr. O'Connor: That is all.

Redirect Examination.

Mr. Mathewson: Q. And Mr. Fatjo, you say the rental was for a period of one year. With what month did this period begin and with what month did it end, do you recollect?

A. I think it was the 1st of June and the 1st of November or first of December. I mean he paid [76] half of it the 1st of June and the other half the first of November or December, I don't know which.

(Testimony of Robert A. Fatjo.)

Q. In 1934 the rental was $2000 a year?

A. Yes, sir.

Mr. Mathewson: That is all.

Recross Examination.

Mr. O'Connor: Q. One further question, please, Mr. Fatjo. It has been your practice for a number of years, has it not, since this ranch has been leased by the Doughertys, to go there on occasions with your family? A. Yes.

Q. Do you recall during the period of time from October, 1934 until June, 1935, whether or not you went down to the premises?

A. Yes, we used to go down on barbecues, once in a while.

Q. You would have your barbecues outside of the house; isn't that correct?

A. Yes, there is a barbecue pit.

Q. And the barbecue pit is near where the horse barn is; isn't that correct? A. Yes.

Q. On any occasion that you were down there, did you see any still? You didn't see any still on those premises, did you?

A. I never went into the barn.

Q. And you didn't smell any odor of alcohol coming from the premises, did you?

A. No, sir.

Mr. O'Connor: That is all.

(Testimony of Robert A. Fatjo.)

Further Redirect Examination.

Mr. Mathewson: Q. Do you recollect what period of time you were down there?

A. We were going to go down there the day that it came out in the newspapers there that there was a lot of trouble down there; we were going to go down to a barbecue that day or the following Sunday, because I remember reading it in the papers.

Q. Had you been down there that year previous to that time? A. Yes.

Q. When?

A. I don't know; we generally go down in the spring [77] time when things are green.

Q. Have you any idea what month?

A. No.

Q. You don't know when it was?

A. No; I know we were going down again at the time when it came out in the newspapers about the trouble down there.

Mr. Mathewson: That is all.

Mr. O'Connor: That is all, Mr. Fatjo.

PHILIP S. GEORGE,

Called as a witness for the Defendant; Sworn.

The Clerk: Please state your full name to the Court. A. Philip S. George.

Direct Examination.

Mr. Mathewson: Q. Where do you reside, Mr. George? A. At Salinas.

Q. What is your occupation?

A. Sales Manager, Pacific Gas & Electric Company.

Q. Where?

A. At Salinas and vicinity.

Q. How long have you held that position with that company?

A. I have been with the company 22 years, approximately.

Q. What are your duties as Sales Manager?

A. Well, I would say just what the name implies —the title implies, the signing up of new business, promotion of new business for the company, and taking care of matters of public relations, and a lot of other things in connection with——

Q. Does it include supervision of accounts?

A. It does not.

Q. Do you have custody of the records of the accounts? A. I do not, no.

Q. Do you have custody of applications for power?

A. Not the final applications. When they are

(Testimony of Philip S. George.)

first secured, yes, but after [78] they are secured, no.

Q. You say you do not have custody of the final applications?

A. What I mean is that we do not keep the records in my office of the applications for service after they are secured. In other words, the application is taken; it is either handed over the service counter or if it is a contract agreement it goes back to our billing department, where they are kept on file.

Q. You were directed to bring with you to-day, were you not, applications for power delivered to the Dougherty ranch? A. I was.

Q. Did you bring any applications for power?

A. I did.

Q. May I see them? (Witness hands certain papers to counsel.)

Q. One of these applications for power, No. 35101, is dated April 30, 1935, bearing the signature of R. Bini; another application for power, dated November 5, 1934, numbered 34283, bearing the signature R. Bini, and the third, dated July 8, 1935, bearing No. 35197, bearing the signature F. A. Dougherty. Were you present at the time these applications were made, Mr. George?

A. I may have been, because those contracts are secured by various individuals.

Mr. O'Connor: Mr. Mathewson, do you want to offer those in evidence?

(Testimony of Philip S. George.)

Mr. Mathewson: Yes.

Mr. O'Connor: I have no objection to them.

The Court: They will be admitted and marked.

(The applications referred to were marked "Defendant's Exhibit B" in evidence.)

DEFENDANT'S EXHIBIT B

No. 35-101

Pacific Gas and Electric Company

AGREEMENT FOR ELECTRIC SERVICE

This Agreement, made by and between the Pacific Gas and Electric Company, a corporation organized under the laws of the State of California, hereinafter called the "Power Company," and R. Bini hereinafter called the "Consumer," Witnesseth that the Power Company hereby promises to sell and deliver to the Consumer, and the Consumer hereby promises to purchase from the Power Company, during the term hereof, all of the electric energy which shall be required for the operation of the Consumer's electrical machinery and apparatus, and in the conduct of the Consumer's business upon the Consumer's premises situate River Road, approximately 11 miles Southwest of Salinas, County of Monterey, State of California, all in accordance with the rules and regulations duly and regularly established from time to time by or under authority of law and on file with the Railroad Commission of

(Testimony of Philip S. George.)

California and relating to the furnishing by the Power Company of electric service.

All electric energy to be delivered and received pursuant to the provisions of this contract shall be what is commonly designated as three phase, 60 cycle alternating current and shall be delivered and metered at an electro-motive force of approximately 230 volts, slight variations in frequency and electro-motive force to be allowed.

All electric energy which shall be delivered by the Power Company to the Consumer under the provisions of this contract shall be paid for monthly by the Consumer at the office of the Power Company in Salinas, California upon presentation to the Consumer of a bill therefor.

The rates and charges to be paid by the Consumer for electric energy and service furnished hereunder shall be the rates and charges duly and regularly established from time to time by or under authority of law and applicable to the furnishing of electric energy and service to the Consumer under the conditions existing from time to time within the district in which said premises are situate.

The Consumer hereby selects, for the service herein specified, Schedule No. P-13, (a copy of which is hereunto annexed), the rates and charges specified in which are legally established and applicable to the service requested by the Consumer, to-wit: irrigation formerly—F. Dougherty

The Consumer agrees that the rated capacity of the electric machinery and apparatus initially in-

(Testimony of Philip S. George.)

stalled for operation, and thereafter operated hereunder during the term hereof, shall not be less than Light..... K. W. Heat..... K. W. Power 3 H. P.

The Consumer, in the event of selling, leasing or otherwise disposing of said premises or the business in which such energy is used, may, with the Power Company's written consent, assign this contract to the lessee or purchaser thereof, if such lessee or purchaser will in writing assume and covenant to perform this contract.

Consumer hereby grants Power Company a right of way over the shortest practicable route for any pole lines which it may be necessary to build over Consumer's premises for the purposes of making delivery hereunder.

This contract shall continue in force until the expiration of the term of one year from and after date of first service, and thereafter until terminated by thirty (30) days' written notice given by either party hereto to the other of a desire for such termination.

Such energy shall be delivered by the Power Company to the Consumer from the Power Company's transformers at a convenient place to be designated by the Consumer, subject, however, to the approval of the Power Company, and delivery of energy and service hereunder shall commence on date of first service.

This contract shall at all times be subject to such changes or modifications by the Railroad Commission of California, as said Commission may, from

(Testimony of Philip S. George.)

time to time, direct in the exercise of its jurisdiction.

In Witness Whereof the parties hereto have executed these presents in duplicate this 30 day of April, 1935.

PACIFIC GAS AND ELECTRIC COMPANY,
By F. W. SNELL,
Division Manager.

R. BINI
(Consumer's Signature)
General Delivery, Salinas, Cal.
Acct. #S28-400
Meter #2026
M.O. #81287—370 GEC

No. 34-283

Pacific Gas and Electric Company
AGREEMENT FOR ELECTRIC SERVICE

This Agreement, made by and between the Pacific Gas and Electric Company, a corporation organized under the laws of the State of California, hereinafter called the "Power Company," and R. Bini hereinafter called the "Consumer," Witnesseth that the Power Company hereby promises to sell and deliver to the Consumer, and the Consumer hereby promises to purchase from the Power Company, during the term hereof, all of the electric energy which shall be required for the operation of the Consumer's electrical machinery and apparatus,

(Testimony of Philip S. George.)

and in the conduct of the Consumer's business upon the Consumer's premises situate Frank Daugherty Ranch, Salinas-Chualar River Road, County of Monterey, State of California, all in accordance with the rules and regulations duly and regularly established from time to time by or under authority of law and on file with the Railroad Commission of California and relating to the furnishing by the Power Company of electric service.

All electric energy to be delivered and received pursuant to the provisions of this contract shall be what is commonly designated as three phase, 60 cycle alternating current and shall be delivered and metered at an electro-motive force of approximately 230 volts, slight variations in frequency and electro-motive force to be allowed.

All electric energy which shall be delivered by the Power Company to the Consumer under the provisions of this contract shall be paid for monthly by the Consumer at the office of the Power Company in Salinas, California upon presentation to the Consumer of a bill therefor.

The rates and charges to be paid by the Consumer for electric energy and service furnished hereunder shall be the rates and charges duly and regularly established from time to time by or under authority of law and applicable to the furnishing of electric energy and service to the Consumer under the conditions existing from time to time within the district in which said premises are situate.

The Consumer hereby selects, for the service herein specified, Schedule No. P-3, (a copy of which is

(Testimony of Philip S. George.)

hereunto annexed), the rates and charges specified in which are legally established and applicable to the service requested by the Consumer, to-wit: domestic water supply formerly—Frank A. Daugherty

The Consumer agrees that the rated capacity of the electric machinery and apparatus initially installed for operation, and thereafter operated hereunder during the term hereof, shall not be less than Light..... K. W. Heat..... K. W. Power 3 H. P.

exp 11-5-35 BM

The Consumer, in the event of selling, leasing or otherwise disposing of said premises or the business in which such energy is used, may with the Power Company's written consent, assign this contract to the lessee or purchaser thereof, if such lessee or purchaser will in writing assume and covenant to perform this contract.

Consumer hereby grants Power Company a right of way over the shortest practicable route for any pole lines which it may be necessary to build over Consumer's premises for the purpose of making delivery hereunder.

This contract shall continue in force until the expiration of the term of one year from and after Nov. 5, 1934, and thereafter until terminated by thirty (30) days' written notice given by either party hereto to the other of a desire for such termination.

Such energy shall be delivered by the Power Company to the Consumer from the Power Company's transformers at a convenient place to be designated by the Consumer, subject, however, to the

(Testimony of Philip S. George.)

approval of the Power Company, and delivery of energy and service hereunder shall commence on Nov. 5, 1934.

This contract shall at all times be subject to such changes or modifications by the Railroad Commission of California, as said Commission may, from time to time, direct in the exercise of its jurisdiction.

In Witness Whereof the parties hereto have executed these presents in duplicate this 5 day of November, 1934.

PACIFIC GAS AND ELECTRIC COMPANY,
By F. W. SNELL,
Division Manager.

R. BINI
(Consumer's Signature)
General Delivery, Salinas, Calif.
Acct. #S28
S28-370
M.O. 76101 GEC

No. 35-197

Pacific Gas and Electric Company

AGREEMENT FOR ELECTRIC SERVICE

This Agreement, made by and between the Pacific Gas and Electric Company, a corporation organized under the laws of the State of California, hereinafter called the "Power Company," and F. A. Dougherty hereinafter called the "Consumer," Witnesseth that the Power Company hereby promises

(Testimony of Philip S. George.)

to sell and deliver to the Consumer, and the Consumer hereby promises to purchase from the Power Company, during the term hereof, all of the electric energy which shall be required for the operation of the Consumer's electrical machinery and apparatus, and in the conduct of the Consumer's business upon the Consumer's premises situate River Road, approximately 12 miles South of Salinas, County of Monterey, State of California, all in accordance with the rules and regulations duly and regularly established from time to time by or under authority of law and on file with the Railroad Commission of California and relating to the furnishing by the Power Company of electric service.

All electric energy to be delivered and received pursuant to the provisions of this contract shall be what is commonly designated as three phase, 60 cycle alternating current and shall be delivered and metered at an electro-motive force of approximately 230 volts, slight variations in frequency and electro-motive force to be allowed.

All electric energy which shall be delivered by the Power Company to the Consumer under the provisions of this contract shall be paid for monthly by the Consumer at the office of the Power Company in Salinas, California upon presentation to the Consumer of a bill therefor.

The rates and charges to be paid by the Consumer for electric energy and service furnished hereunder shall be the rates and charges duly and regularly established from time to time by or under authority of law and applicable to the furnishing of electric

(Testimony of Philip S. George.)

energy and service to the Consumer under the conditions existing from time to time within the district in which said premises are situate.

The Consumer hereby selects, for the service herein specified, Schedule No. P-13, (a copy of which is hereunto annexed), the rates and charges specified in which are legally established and applicable to the service requested by the Consumer, to-wit: power for domestic pumping formerly—R. Bini

The Consumer agrees that the rated capacity of the electric machinery and apparatus initially installed for operation, and thereafter operated hereunder during the term hereof, shall not be less than Light..... K. W. Heat..... K. W. Power 3 H. P.

exp 6-20-36 AK

The Consumer, in the event of selling, leasing or otherwise disposing of said premises or the business in which such energy is used, may, with the Power Company's written consent, assign this contract to the lessee or purchaser thereof, if such lessee or purchaser will in writing assume and covenant to perform this contract.

Consumer hereby grants Power Company a right of way over the shortest practicable route for any pole lines which it may be necessary to build over Consumer's premises for the purpose of making delivery hereunder.

This contract shall continue in force until the expiration of the term of one year from and after June 20, 1035, and thereafter until terminated by thirty (30) day's written notice given by either

(Testimony of Philip S. George.)

party hereto to the other of a desire for such termination.

Such energy shall be delivered by the Power Company to the Consumer from the Power Company's transformers at a convenient place to be designated by the Consumer, subject, however, to the approval of the Power Company, and delivery of energy and service hereunder shall commence on June 20, 1935.

This contract shall at all times be subject to such changes or modifications by the Railroad Commission of California, as said Commission may, from time to time, direct in the exercise of its jurisdiction.

In Witness Whereof the parties hereto have executed these presents in duplicate this 8 day of July, 1935.

PACIFIC GAS AND ELECTRIC COMPANY,
By F. W. SNELL,
Division Manager.

F. A. DOUGHERTY
(Consumer's Signature)
Rte. 1, Box 292
Salinas
Acct. #S28-370 Meter #3469
M.O. 83498

GEC

[Endorsed]: Deft's Ex. B. Filed June 13, 1939. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

(Testimony of Philip S. George.)

Mr. Mathewson: Q. Mr. George, did you make a search for an application for power bearing the date of January 31, 1935 and the signature of Frank Dougherty? A. Yes.

Q. Did you find any such application for power?

A. I was unable to locate it. [79]

Q. Did you make an examination of your accounts, or did you make an examination of the account of Frank A. Dougherty? A. Yes.

Q. Do your records show the consumption of power by Frank A. Dougherty on meter No. 3469, commencing with January 31, 1935?

Mr. O'Connor: That is objected to upon the ground that it is incompetent, irrelevant, and immaterial, and the records are the best evidence, and the proper foundation has not been laid in this——

The Court: Q. Have you the record?

A. I haven't the record with me, no, sir.

Q. Where are they?

A. I was required to bring the applications for service, which I did.

Q. Have you knowledge of it, yourself?

A. I might state that the space of time between the two Bini applications, there, the account was in the name of Frank Dougherty.

Mr. O'Connor: I move that that go out on the ground that it is incompetent, immaterial and irrelevant, not the best evidence.

(Testimony of Philip S. George.)

The Court: You are entitled to the best evidence if it is available. Is it available?

A. It is in Salinas.

Mr. Mathewson: No further questions.

Mr. O'Connor: No cross-examination.

EDWARD C. HARKINS,

called as a witness for defendant; sworn.

The Clerk: Please state your full name to the Court.

A. Edward C. Harkins.

Direct Examination

Mr. Mathewson: Q. Mr. Harkins, you are an agent of the Alcohol Tax Unit? A. I am.

Q. Were you an agent acting as such in May, 1935? A. I was.

Q. Did you participate in the investigation that culminated in the [80] seizure of a distillery on the Dougherty Ranch on June 3, 1935?

A. I did.

Q. The seizure took place on the 3rd of June, 1935? A. That is correct, yes.

Q. Did you have the Dougherty Ranch under observation prior to that date?

A. I did, yes.

Q. When did you have it under observation prior to June 3rd?

(Testimony of Edward C. Harkins.)

A. Particularly on May 31st, 1935, but we had been engaged for—Investigator Myers and I had been engaged for a couple of weeks in trailing a car to these premises prior to that.

Q. What did you observe on May 21st, 1935?

Mr. O'Connor: That is objected to on the ground that it is incompetent, irrelevant and immaterial.

The Court: Read the question, Mr. Reporter.

(The reporter read the question.)

The Court: May 21st. I will allow it.

A. I observed a Ford—a grey Ford—a grey Plymouth coach, license 8H 8305 of that current year enter the north gate on the Dougherty ranch about 7:15 p.m., the car incidentally which we had been following. I also obtained a strong odor of mash from the road and from the field to the south of the ranch. I also observed a truck on the same evening go in the south gate of the ranch.

Q. You say you observed an odor of fermentation? A. I did, yes.

Q. How far were you from the ranch at the time you noticed it?

A. Well, from the River Road, it would be a matter of about 300 yards, to the best of my recollection.

Q. What time of the evening was this?

A. The Plymouth coach entered the north gate at about 7:15 p.m.

Q. Did you have the premises under observation on any time after May 21st?

(Testimony of Edward C. Harkins.)

A. Yes, on—that was May 31st. On June 1, in the afternoon, with Investigator Myers, I observed—that is, we were [81] driving by on the River Road; I observed a man in front of Dougherty's house, which I later—who I later recognized as George Harrison, who was arrested on the evening of the seizure.

Q. And the date of that observation was what?

A. I believe—I am not exactly positive, but I think that was June 1st in the afternoon. It was prior to the seizure, at any rate.

Q. When did you next have the place under observation? A. On the night of June 3rd.

Q. Will you relate what transpired on that evening?

A. Yes, with other investigators—there were several in the party—we approached the premises from the south. From a distance of about a quarter of a mile we could get the odor of fermenting mash.

Q. What time of the day or night was that?

A. We made the seizure about 9:05 p.m., so it was shortly prior to 9:05 p.m. And approaching closer, somewhat closer,—within a hundred or two hundred yards, we could hear the noise of burners. We surrounded the barn and arrested a man giving the name of Dante Brunzo operating the still at that time. A few minutes later, about 9:15, a truck was driven in and we arrested Rodoni,

(Testimony of Edward C. Harkins.)

and the truck driver, and George Harrison, who was walking behind the truck. At about 9:30 p.m., Investigator Shanks and I went over to the front of the Dougherty house, the residence. The door was open, the screen door, however, was there, and Dougherty was sitting inside in plain view. I told him that we were Federal officers, asked him if he owned the ranch. He said, "Yes." I said, "Well, you are under arrest." He said, "What for, that thing over there? I have got a lease," and he produced the lease at that time to show us the lease that he had.

Q. I show you Plaintiff's Exhibit No. 1 in evidence and ask you if you recognize that document.

A. Yes, this is the lease that he produced at that time. [82]

Q. That is the lease that Mr. Dougherty produced at the time of his arrest? A. Yes.

Q. After Mr. Dougherty produced the lease, what happened?

A. We took him over to the barn in a few minutes, where we had the other defendants, left him there. Then Investigator Shanks went to a cabin that is in back of the Dougherty house, slightly north, where we saw Mr. Myers put a man giving the name Guiseppi Guinto under arrest.

Mr. Mathewson: That is all.

(Testimony of Edward C. Harkins.)

Cross Examination

Mr. O'Connor: Q. Now, Mr. Harkins, you went to the premises known as the Dougherty Ranch on the evening or the night of June 3, is that correct? A. June 3, that is correct, yes.

Q. What time did you enter the building where the still was? A. About 9:05 p.m.

Q. Who was with you?

A. Well, I went in alone.

Q. What other agents accompanied you to the premises?

A. Present at the raid there on the barn there was Investigator Myers, Investigator Byrd, Investigator Shanks, and Investigator Blair.

Q. After you made your seizure of the still and arrest of whomever you arrested in the still premises, I understand that you and Investigator Shanks went to the Dougherty ranch house; is that correct?

A. Not immediately. We arrested Truck Driver Harrison before going to the ranch house.

Q. After you completed the arrest of the persons who were immediately identified with the still, you and Investigator Shanks did go to the ranch house; that is correct? A. Yes, sir.

Q. When you got to the ranch house how did you approach it, from the front or the rear, or how?

A. We went up—we walked around the ranch house, but we went up the front porch on the premises. [83]

(Testimony of Edward C. Harkins.)

Q. Did you walk around the ranch house from the front or from the rear?

A. From the rear.

Q. You came around towards the front porch?

A. That's it, yes.

Q. Entered the room that would be on the north side of the ranch house; is that correct?

A. Well, it would be on the side facing the River Road, which I believe is the northeast side.

Q. When you got there was the door open or closed? A. The front door was open.

Q. There was a screen door closed, was there?

A. The screen door was closed.

Q. You opened that door?

A. I beg pardon?

Q. You opened the screen door?

A. Not me.

Q. Did you speak to the man inside first?

A. We spoke to Dougherty, yes.

Q. What did you tell him?

A. I said, "We are Federal officers. Do you own this ranch?" He said, "Yes."

Q. He said he owned the ranch?

A. He did.

Q. And then what did you say?

A. We said, "You are under arrest for that still in the barn."

Q. You said, "You are under arrest for the still in the barn"? A. Yes.

(Testimony of Edward C. Harkins.)

Q. As I understand it, you said, "We are Federal officers. Do you own that ranch?" And he said, "Yes."

A. No, I said, "We are Federal officers. Do you own this ranch?"

Q. Yes. And he said he did.

A. He said he did.

Q. Then you said, "You are under arrest for that still in the barn"?

A. Yes; words to that effect.

Q. You said that? A. Yes.

Q. You are the first one to mention "still"?

A. I beg your pardon?

Q. You were the first one to mention the word "still"?

A. I am not [84] sure about the "still", but I said, "You are under arrest."

Q. Now you just a moment ago told us that you said, "You are under arrest for that still in the barn." Did you say that or did you not?

A. No; to the best of my recollection I did not.

Q. You did not? A. Yes.

Q. So a moment ago when you said that you did, you were incorrect? A. I was mistaken.

Q. What did Dougherty say when you told him then that he was under arrest?

A. He said, "What, for that thing over there? I have got a lease."

Q. He said, "I have got a lease"?

(Testimony of Edward C. Harkins.)

A. Yes.

Q. Are those his exact words?

A. To the best of my recollection.

Q. Well, what did you say to him?

A. I said, "Well, I don't care how many leases you have; you are under arrest," and he then got up to get the lease, which he did.

Q. And did he show you the lease?

A. He did. He also said at that time, "I just rented the place to them; I have got nothing to do with it.

Q. In other words, he denied any connection with the still? Did he deny that he knew any still was there?

A. He did later when he was questioned.

Q. But on this first occasion he, after you had this conversation, got up and got the lease?

A. Yes, that is correct.

Q. Now, I call your attention to your testimony before the United States Commissioner on Saturday, June 8, 1935, page 9, in case you have got a copy of it. Directing your attention to page 9, beginning where I have marked it, here, down to there (indicating), and ask you to read that (handing transcript to witness). And I also direct your attention to page 7 of the same transcript and ask you to read where marked beginning on page 7 and continuing down to where marked on page 8. Now, Mr. Harkins, I ask you if on June 8, 1935, you [85] were asked the following questions before Ernest E. Wil-

(Testimony of Edward C. Harkins.)

liams, United States Commissioner for the Northern District of California, and if you gave the following answers:

"Q. Who was present when you first talked to Dougherty? A. Investigator Shanks.

"Q. What was the conversation you had with Dougherty when you first talked to him?

"A. I have already mentioned it. I went to the door and told him we were Federal officers and that he was under arrest.

"Q. Did you open the door.

"A. I did. We went to the door and spoke to him from outside and went in. I don't remember whether Shanks or I went in first.

"Q. You went to the door? A. Yes.

"Q. Was the door closed?

"A. The screen door was closed. I could see him inside.

"Q. But was the door closed?

"A. Yes.

"Q. And you opened the door and walked in? A. Yes.

"Q. Which one went in first?

"A. I don't recall.

"Q. And you told him he was under arrest?

"A. I told him we were Federal officers and he was under arrest.

"Q. What did he say?

"A. He said, 'What, for that thing over there? I have a lease.'

(Testimony of Edward C. Harkins.)

"Q. What else was said?

"A. I said, 'I don't care how many leases you have got; you are under arrest,' and he said, 'I have nothing to do with it; I just rented them the land.'

"Q. What did you say to that?

"A. I don't recall. We told him to come on, and we went from there.

"Q. Did you immediately take him out of the house?

"A. In a few minutes, yes.

"Q. Did you bring him back to the house again? A. Yes."

Did you so testify?

A. I believe it is substantially correct. [86]

Q. Now, then directing your attention to your testimony before the same Commissioner on the same day, at page 9 of the transcript, I ask you if you were asked these questions and if you gave these answers:

"Q. And he did not tell you the first time he knew the still was there when you people put him under arrest?

"A. I don't recall exactly; I presume he did.

"Q. You say you presume he did. Do you know whether he did?

"A. I know he denied any knowledge of it.

(Testimony of Edward C. Harkins.)

"Q. And didn't he voluntarily surrender to you the lease he had for this particular twenty acres of land?

"A. When we went back to the house he showed me the lease and I said if he would give it to me I would see that it was returned to him.

"Q. When did he show you the lease—on the first occasion you went to the house or the second occasion?

"A. To the best of my recollection he got the lease the first occasion."

So that if you testified before the United States Commissioner that he got the lease and gave you the lease on the second occasion when you went back there you were incorrect; is that correct?

A. Well, I would say that I believe he showed—it is a long time ago; the best of my recollection is that he got the lease, showed us the lease the first time, but gave it to us the second time. We didn't take it, I believe, at that time.

Q. Now, at that time after you talked with Dougherty he completely denied any knowledge that there was a still on those premises, didn't he?

A. He did, yes.

Mr. O'Connor: That is all.

Mr. Mathewson: That is all. [87]

FRED L. MYERS,

called for the defendant; sworn.

The Clerk: Q. Please state your full name to the Court.

A. Fred L. Myers.

Direct Examination

Mr. Mathewson: Q. Mr. Myers, you are an agent of the Alcohol Tax Unit?

A. I am, yes, sir.

Q. And you were acting as such in May, 1935?

A. I was, yes, sir.

Q. Did you participate in the investigation that culminated in the seizure of a distillery on the Frank Dougherty Ranch on June 3, 1935?

A. I did, yes, sir.

Q. Did you, previous to June 3, 1935, have the Dougherty Ranch under observation?

A. I did, yes, sir.

Q. When?

A. Between the dates of May 14th and June 1st.

Q. Between the dates of May 14th and June 1st?

A. That is correct, yes, sir.

Q. From what place or places did you have the Dougherty Ranch under observation on those dates?

A. The Dougherty Ranch, itself, was called to my attention by Investigator Harkins on June 1st —May 31st he was dropped off by me while we drove by the premises in that immediate vicinity. I, myself, covered both approaches, one located

(Testimony of Fred L. Myers.)

seven miles—about seven miles north of the Dougherty Ranch, and one located about three miles south of the Dougherty Ranch.

Q. Calling your attention to the evening of June 3, 1935, will you relate what happened at the time that you went upon the premises of the Dougherty Ranch?

A. Subsequent to the seizure, Mr. Mathewson?

Q. Previous to the seizure.

A. We parked our cars about a mile away south of the premises, crossed through the open fields and approached the Dougherty Ranch from the south. About a quarter of a mile [88] from the Dougherty Ranch, itself, we could hear a pump—mechanical pump—working. When about 150 to 200 yards from the ranch premises we could obtain the odor of fermenting mash. In circling the barn Investigator Harkins entered the premises. I followed soon after and placed Brunzo, who was operating the still at that time, under arrest.

Q. Mr. Myers, of what did the still consist?

A. It was a large still, about 25,000 gallons of mash, a 1000-gallon cooking pot, steam boiler, and about five or six hundred gallons of alcohol.

Q. Was the mash contained in one or more tanks? A. Six vats, I believe.

Q. Six vats? A. Yes, large vats.

Q. Do you know how large the still, itself, was?

A. It turned out about 500 gallons a day, I should think.

(Testimony of Fred L. Myers.)

Q. After the arrest of Mr. Brunzo—was he the one arrested in the still?

A. Operating the still proper, yes.

Q. After the arrest of Mr. Brunzo, what happened?

A. A few moments later—about ten minutes later, about quarter after nine, a truck drove onto the premises on the south road with its lights out. We allowed this truck to approach up to the still, proper. Investigator Harkins, and Shanks, and myself, placed the driver under arrest. I stayed behind and arrested Harrison, who came walking up from the *d*ate at the River Road. When he was within a matter of forty or fifty feet of the still I placed him under arrest.

Q. Did you search Mr. Harrison?

A. I did not; no, sir.

Q. After the arrest of Mr. Harrison, what did you do?

A. I was in the still premises with Brunzo. He was arrested first, and the matter of changing his clothes came up. I followed him from the still premises north on what appeared to be a well-traveled path about 80 to 90 yards to a cabin, where the defendant Longo was [89] asleep. I placed Longo under arrest, and was soon joined by Harkins and Shanks.

Q. What was the relation between the cabin where you found Longo asleep and the house on the Dougherty ranch?

(Testimony of Fred L. Myers.)

Mr. O'Connor: That is objected to upon the ground that it calls for the opinion and conclusion of the witness.

The Court: Objection sustained. Proceed.

Mr. Mathewson: Q. How far was the house in which you arrested Longo from the residence on the ranch? A. About 20 yards, sir.

Q. About 20?

A. Yes, sir; it was slightly past the ranch house, I should say west by north of the ranch house, itself.

Q. With reference to the ranch house, where did the path from the barn to the ranch house where Longo was arrested pass?

A. In the rear of the ranch house, but separated by a fence or enclosure—a building. There was another building between the path and the ranch house, a chicken shed, or something of that sort.

Q. Did you see the Dougherty ranch premises in daylight? A. Just recently, sir.

Q. I show you a picture of the Dougherty ranch, and ask you if you can indicate on that picture, if you can, the approximate location of the house where you arrested Longo?

A. It is not shown here, Mr. Mathewson.

Q. Well, can you indicate the direction from any of the structures shown there?

A. Yes, sir; it should be setting over here where my thumb is.

(Testimony of Fred L. Myers.)

Q. It was beyond the range of the picture?

A. Yes, sir.

Q. Beyond the range of that picture?

A. Yes.

Q. Beyond this building and over here?

A. That is correct; and slightly to the west.

Q. Slightly to the west?

A. We are looking, as I recall it, from [90] the west to the east, there.

Q. This structure on the left-hand side is the residence on the ranch?

A. The large structure, yes, sir.

Q. And the structure on the right-hand side is the——

A. Horse barn where the still was located.

Mr. Mathewson: If your Honor please, I ask that Defendant's Exhibit A for identification be admitted in evidence.

Mr. O'Connor: Objected to upon the ground that it is incompetent, irrelevant, and immaterial.

The Court: Objection overruled. Let it be admitted and marked.

(The photograph heretofore marked "Defendant's Exhibit A for identification" was admitted in evidence and marked "Defendant's Exhibit A.")

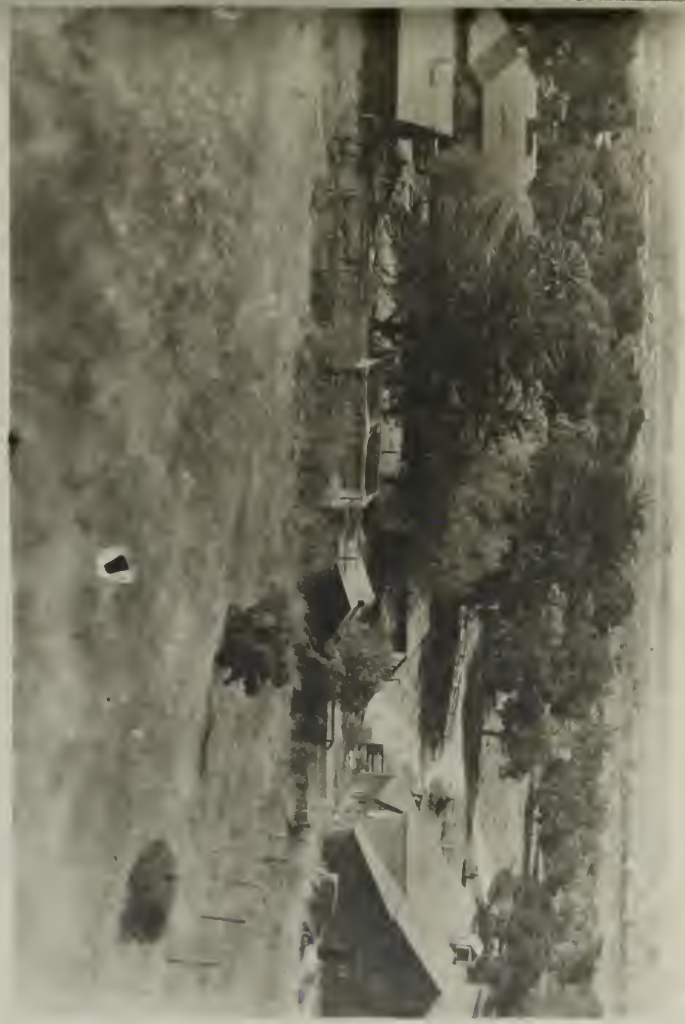
CN 349 ST. R.F.D. # 1 Salinas Calif
Photographed June 3rd.1935 by
Walter A. Patterson
Investigator

20425-R
Deft's Exhibit A
for Identification
6/13/39.

CASE 3814-M - EXHIBIT #3

U. S. DIST. CT. N. D. CAL.
No. 20425-R
Dougherty vs. Lewis
Deft's EX. No. A
FILED June 13, 1939
WALTER B. MALING, Clerk
BY J. A. Schaertzer
DEPUTY CLERK

No. 9492
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT
FILED
APR 15 1940
PAUL P. O'BRIEN
CLERK



Mr. Mathewson: That is all.

Mr. O'Connor: No questions.

CLAUDE M. SHANKS,

called for the defendant; sworn.

The Clerk: Please state your full name to the Court.

A. Claude M. Shanks.

Direct Examination

Mr. Mathewson: Q. Mr. Shanks, you are an agent of the Alcohol Tax Unit? A. Yes, sir.

Q. Did you participate in the seizure of a distillery on the Dougherty Ranch on June 3, 1935?

A. I did.

Q. Will you relate your participation in the seizure?

A. I approached, as has been stated, with the rest of the men, heard the pump running, *bot* the odor of distillation. I was one of the men——

Q. From what point did you obtain the odor of distillation? [91]

A. Oh, I would say 300 yards. It was dark. It was pretty close.

Q. Where were you when you obtained this odor?

A. Coming through a field where there was cut grain shocked. It was south and east—possibly a little east—of the barn where we seized the still.

Q. All right. Proceed.

(Testimony of Claude M. Shanks.)

A. I was on the outside. I was present when the truck driver was arrested. I was present when Myers brought Harrison up from following the truck. I was present when Dougherty was arrested.

Q. What happened at the time of Dougherty's arrest?

A. We went—this path that runs to the back part of the house, it was a well worn path. I and Investigator Harkins followed this path around; we went through a gate, and to my recollection that portion, it would be west of the house, around to the front. There was a light in there. Investigator Harkins went up to this door, which was a screen door, and said, "Federal officers," asked him if he owned the ranch, and he said he did. He told him he was under arrest. We entered. And Dougherty said, "What, for that thing over there?"—pointing. He says, "I have a lease." I asked Dougherty for the lease. There was some more conversation irrelevant. Dougherty was searched at that time. I took a pocket knife away from him, and I asked him for the lease, and my recollection is that he handed me the lease and I passed it to Harkins. We then taken him to the still barn. I wasn't present when he was questioned.

Q. Had you gone into the still barn before you went up to Dougherty's place?

A. No, sir, I had not. I had been outside watching all the time. I hadn't been into the still premises yet.

(Testimony of Claude M. Shanks.)

Q. Do you remember whether or not you observed the odor of distillation at Dougherty's house?

A. Oh, yes, the odor of distillation was plain. We obtained it a considerable distance out in the field. We could hear the pumps; we could hear the burner going; there [92] was no question in anyone's mind but what there was a still there.

Mr. O'Connor: I move that that that go out as not binding on the plaintiff.

The Court: It may go out.

Mr. Mathewson: Q. Were you present at Harrison's arrest?

Mr. O'Connor: The latter part of that answer I move go out about their being no question in anybody's mind.

The Court: It may go out. "No question in anybody's mind" may go out.

Mr. Mathewson: Q. Were you present at the time of the arrest of Mr. Harrison?

A. No, I was not. He came up behind the truck and I was at the truck when that arrest was made.

Mr. Mathewson: That is all.

Cross Examination

Mr. O'Connor: Q. Mr. Shanks, do you know whether or not, or are you certain whether or not the lease was given to you and investigator Harkins on your first visit to the Dougherty house, or when you returned to the Dougherty house?

A. I am very positive that I asked for that lease

(Testimony of Claude M. Shanks.)

at that time, and I handed it to Investigator Harkins on that first trip.

Q. No doubt in your mind about that?

A. There is no doubt, no, sir, in my mind.

Q. And he produced the lease at that time?

A. I asked him to produce the lease.

Q. Didn't he deny that he had any knowledge of a still being on those premises?

A. I wasn't present when he was questioned, but his remark was, when he says, "What, for that thing over there? I have a lease."

Q. Didn't he deny at that same time that he had any knowledge of the still being there?

A. He did not, not in my presence. I wasn't [93] present when he was questioned.

Q. Wait a minute. I mean on the first occasion when you were there. A. No, he did not.

Q. If Investigator Harkins testified that he did deny it on the first occasion when you were there, would he be incorrect?

A. Not to my knowledge.

Q. Would you say that he did or did not?

A. He did not.

Q. Or that you did not hear it?

A. If he did, I didn't hear it.

Mr. O'Connor: That is all.

The Court: We will take an adjournment until two o'clock.

(A recess was here taken until two o'clock p. m.)
[94]

Afternoon Session

Mr. Mathewson: If your Honor please, at this time, if it is permissible, I should like to take three witnesses out of order, witnesses for expert opinions as to the rental value of the property.

GUY J. PEDRONI,

called for the defendant; sworn.

The Clerk: Q. Please state your full name to the Court.

A. Guy J. Pedroni.

Direct Examination

Mr. Mathewson: Q. Where do you reside, Mr. Pedroni? A. Salinas.

Q. What is your business or occupation?

A. Assistant cashier Salinas National Bank in Salinas

Q. How long have you held that position?

A. Well, with this particular bank, I have been with them since August—no, August, 1930, but I have filled a similar position with the original First National Bank and subsequently Bank of Italy, and Bank of America.

Q. What are your duties at the bank?

(Testimony of Guy J. Pedroni.)

A. General duties of an assistant cashier.

Q. Do they include the duties of supervising the work of appraisers in your institution?

A. Yes, to some extent.

Q. What experience have you had in the appraising of property?

A. Well, I have had some experience. I pass on practically all of the loans—that is, I don't make the appraisal; I do pass on the loans as they are submitted.

Q. In passing on the loans, as they are submitted, do you take into consideration the appraisal as determined by the bank appraiser?

A. Yes, in a great measure, for the reason that they go right on the premises and they analyze the property, especially where there [95] are buildings on it, as to buildings on it, as to buildings.

Q. As a result of your experience in supervising the work of the appraisers, are you familiar with the rental values of farm properties in the vicinity of Salinas?

A. Somewhat, yes, sir.

Q. Are you familiar with the property known as the Frank Dougherty Ranch, about 12 miles southwest of Salinas?

Mr. O'Connor: Just a moment. If your Honor please, at this time I desire to examine the witness on his qualifications.

The Court: You may.

(Testimony of Guy J. Pedroni.)

Mr. O'Connor: Q. Do you do appraisal work, yourself, Mr. Pedroni?

A. Not altogether, no, sir.

Q. What do you mean "not altogether"?

A. I mean that isn't my job only. I do that along with other duties at the bank.

Q. I mean, do you actually go out and appraise property, yourself? A. I have, yes, sir.

Q. You what? A. I have.

Q. What type of property have you appraised, Mr. Pedroni?

A. Well, I have appraised ranch properties, and I have appraised homes.

Q. How long have you been doing that work?

A. Well, it hasn't been steady, but every time I am called upon.

Q. Say over a year, how often would you make an appraisal of the value of a piece of property?—I mean your own appraisal as distinguished from the appraisal or from passing on a loan that has been appraised by another appraiser at the bank? I mean your own actual appraisal of values.

A. As I am called on by the bank officers to go out.

Q. When was the last time you made an appraisal?

A. Oh, it has ben about two months, I guess.

Q. Did you make that appraisal yourself independent of any other appraiser?

(Testimony of Guy J. Pedroni.)

A. No, usually you have another member of the [96]—another officer of the bank.

Q. Was that for the purpose of passing on an application for a loan? A. That is right.

Q. Was it ranch property?

A. This happened to be a home, that last one.

Q. Happened to be a home? A. Yes.

Q. When is the last time you appraised any ranch property in the vicinity of Salinas?

A. It has been some little time; I guess probably six or eight months.

Q. At that time did you make an independent appraisal, yourself, or did you base your loan upon the work of some other appraiser?

A. Well, the appraisal was made by myself and the other officer of the bank.

Q. Did you examine the property?

A. Yes, sir.

Q. That was ranch property? A. Yes, sir.

Q. Within the period of the last five years how many pieces of ranch property would you say that you have appraised?

A. Well, approximately half a dozen.

Q. Half a dozen within five years. All of the appraisal work that you have done was for the purpose of passing upon loan applications pending before the bank by whom you were employed; isn't that correct? A. That is right.

Q. That is the only thing you had in mind when you made an appraisal?

(Testimony of Guy J. Pedroni.)

A. In connection with the bank for loan purposes.

Q. What is the extent of the normal limits of the percentage you would loan on a piece of property? What value—is it 40 per cent of the value, or 50 per cent of the value, or what?

A. That varies as to the income that the property can produce.

Q. What would be the top limit of your loan?

A. 50 per cent.

Q. What? A. 50 per cent. [97]

Q. 50 per cent would be the top limit?

A. Yes, sir.

Mr. O'Connor: That is all.

Mr. Mathewson: Q. Are you familiar with the Frank A. Dougherty property, located about 12 miles southwest of Salinas?

A. I know where it is located, yes, sir.

Q. Do you know the property?

A. I do. I haven't been on it, but I know what the property is. I have known it for a number of years.

Q. Are you familiar with property of similar nature and description in and around Salinas?

A. Yes, I think I am.

Q. Are you familiar with the rental values prevailing in that community for property of this same type and description as the Frank Dougherty property? A. I am.

Q. Are you in particular familiar with that por-

(Testimony of Guy J. Pedroni.)

tion of the Frank Dougherty property in front of the residence and down along the River Road?

A. I think I know the property, yes.

Q. Have you an opinion as to the rental value of approximately 20 acres of that property, including barn, corral, two small sheds, and the use of water for the purpose of feeding dry stock?

Mr. O'Connor: Just a moment. If your Honor please, I object to the question upon the ground that it is incompetent, irrelevant, and immaterial, and not within any of the issues of this case; and I make the further objection that the question as now framed does not take into consideration or identify the particular piece of property with which we are concerned and that it is too general. I submit both objections.

The Court: Q. You say you are familiar with this property?

A. I am.

Q. And this particular twenty acres?

A. As to that specific acreage, I don't know. I have an idea what the property is. [98]

Q. What do you mean by an idea?

A. Well, this portion here is part of a larger tract of land. Whether it is bounded by fences I am not able to say.

The Court: It goes to the weight of the testimony; I will allow it.

(The reporter read the last question asked by Mr. Mathewson.)

(Testimony of Guy J. Pedroni.)

Mr. Mathewson: Q. Have you an opinion, Mr. Pedroni?

A. Yes; the rental value is between $10 to $15 an acre. $15 would be the very maximum.

Q. That includes the barn, corrals, sheds and the use of water? A. Yes, sir.

Q. That is an annual rental, Mr. Pedroni?

A. An annual rental.

Mr. Mathewson: That is all.

Cross Examination

Mr. O'Connor: Q. What do you mean by an annual rental? $15 a year?

A. $15 per acre a year.

Q. Now, what particular twenty acres are you referring to?

A. Well, any of that land in that vicinity there couldn't demand much more than that for the purpose,——

Q. What particular land are you referring to?

A. That particular 20 acres and adjoining——

Q. Where is that particular 20 acres?

A. This particular piece of land fronts on the River Road kind of southwest of Salinas, approximately ten or twelve miles, and does not go across the road. It is on the right side of the road. In other words, it is on the west side—southwest side.

Q. Have you been on the land?

A. I have been on the road, not on the land.

Q. When were you on the road?

A. About ten days ago.

(Testimony of Guy J. Pedroni.)

Q. Who were you with? A. Mrs. Pedroni.

[99]

Q. Who else? A. No one else.

Q. Well, how do you know what particular 20 acres was involved in this particular litigation?

A. From the description given here in this court this morning.

Q. From the description this morning?

A. Yes, sir.

Q. At the time that you made your appraisal did you know what particular 20 acres were involved?

A. I didn't make any appraisal. You asked me the question as to the value, and I think that piece of land is no exception to any other adjoining property, and that is the rental value.

Q. Do you know anything about the income from that particular land over a period of years?

A. No, I do not.

Q. Assuming, Mr. Pedroni, that that particular land, ten acres of it, were capable of producing 25 tons of hay a year. What is the average price of hay per ton, do you know?

A. On average crops?

Q. Yes.

A. In a good year, when it is a good crop, I would say that two tons to two and one-half tons would be the highest crop production that could be produced on any of that land there or adjoining, and that wouldn't be every year, it would have to be rotated.

(Testimony of Guy J. Pedroni.)

Mr. O'Connor: May I have that answer read?

(The reporter read the answer.)

Mr. O'Connor: Q. You mean per acre, don't you?

A. Per acre, yes.

Q. Assuming two and one-half tons per acre for ten acres, that would give you how many tons of hay? A. Well, it would give you 250 tons.

Q. Right. 250 tons of hay. What is the prevailing price of hay—the average price of hay per ton?

A. Well, at the present time I think it is in the neighborhood of ten or eleven dollars a ton.

Q. Do you know what it was in 1934?

A. No, I do not.

Q. Well, wouldn't the determination as to the rental value of that land during the year 1934 be dependent upon the ability of the land to [100] produce?

A. You can't adjust it based on any one particular year; it would have to be spread over years; you would have to take the lean years along with the good years.

Q. What would you say would be the rental value of the 20 acres of land that we are speaking about without the barns?

A. It wouldn't decrease the rental value a great deal.

Q. In other words, do I understand it to be your opinion that there was a horse barn that could accommodate 16 horses, with 16 stalls, and with a storage capacity for hay of about 30 tons—do I

(Testimony of Guy J. Pedroni.)

understand that that would not enhance the rental value of that property at all?

A. No, I don't think so.

Q. In other words, barns add no value to the property, at all?

A. Well, it adds some value, yes, but not from the standpoint of production.

Q. Well, I am not talking about production; I am talking about renting. Would it add anything to the rental value?

A. I don't think it would change the rental value a great deal.

Q. On what do you base your figure of from $10 to $15 per acre?

A. The production of crops; what the land would be used for.

Q. Are you familiar with the production of crops on this particular 20 acres?

A. Well, fairly so.

Q. Well, what did it produce in the year 1933?

A. I would have to give you an average over probably a period of years.

Q. Well, let's take 1933. Do you know what it produced in 1933? A. No, I do not.

Q. Do you know what it produced in 1934?

A. I do not.

Q. Do you know what it produced in 1935?

A. No.

Q. Do you know what it produced in 1931?

A. I do not.

(Testimony of Guy J. Pedroni.)

Q. Would you say that a rental value of $20 an acre for this particular land was an exorbitant rent?

A. It is for this [101] particular piece, yes, sir.

Q. On what do you base that statement?

A. The land will not produce it.

Q. Do you know anything about the ability on the remaining ten acres of this land that is not devoted to hay, for grazing purposes?

A. The other ten acres?

Q. Yes.

A. I presume that is used for grazing purposes and more corrals and the like.

Q. Do you know in that particular area what rental would be paid per horse for grazing on that land?

A. You couldn't pay very much unless you imported the feed.

Q. I am not asking if you paid very much. I am asking you do you know how much is paid.

A. No, I do not.

Q. So you do not know what the remaining ten acres would produce in revenue if used as grazing land, do you?

A. As grazing land I would think that a dollar or a dollar and a half an acre would be sufficient rental.

Q. Well, do you know whether grazing land—for instance, isn't it true that people who own land in that vicinity graze horses or mares or horses, at so

(Testimony of Guy J. Pedroni.)

much per day per horse over a period of time, and not so much per acre?

Mr. Mathewson: If your Honor please, I object to this line of examination. The announced purpose of renting that property was for feeding dry stock. The opinion of the witness was asked as to the use of the property for feeding dry stock, not the pasturing of mares.

Mr. O'Connor: I submit that if the property is leased, the person leasing it can use it for anything he wants. The fact that he was going to feed dry stock would not be the determining factor in the rental value. [102]

The Court: What is the fact?

Mr. O'Connor: What is the fact about what?

The Court: What was raised on it?

Mr. O'Connor: I don't know. I think it becomes immaterial what was raised on it. The material fact is what could the land produce. What these particular people wanted to use it for is immaterial. They could use it for anything they wanted for what they leased it.

The Court: For example, basing the value on the return on that acreage for raising mares or horses, for example, the fact is that there weren't any raised.

Mr. O'Connor: There is no evidence here that there wasn't. I don't know if there was or not. It becomes immaterial if there was or not.

(Testimony of Guy J. Pedroni.)

The Court: That is the reason he is objecting, because it is immaterial. That is his objection.

Mr. O'Connor: My point, if your Honor please, is that once I lease a piece of property, you can do anything you want with the property; you can raise anything you want on it.

The Court: No doubt; but here we call an expert for the purpose of ascertaining what is a reasonable rental for property, this property, property in that vicinity; whether or not it is excessive rent. That is the issue here.

Mr. O'Connor: Yes; I am cross-examining on that. And if I can show that that land is capable of producing, for instance, hay; if I can show that it is capable of being used for grazing land; if I can show that the revenue from that land is in excess of what this witness says it is by my cross-examination, it certainly affects his opinion and goes to the weight of his opinion.

The Court: I will allow it. Proceed. Let's get through with this witness. [103]

Mr. O'Connor: Please read my last question.

(The reporter read the last question.)

Mr. O'Connor: Will you answer that question, please, Mr. Pedroni?

A. The pasture land, live stock, of horses in a number as mentioned before the Court here, it appears to me that they must have to import feed, because that land or no land would produce sufficient to feed those animals.

(Testimony of Guy J. Pedroni.)

Mr. O'Connor: I move to strike the answer upon the ground that it is not responsive to the question.

The Court: The answer will stand. Proceed.

Mr. O'Connor: Q. Will you please answer the question that I asked you, Mr. Pedroni: do you know it to be a fact that in that particular section of the country that grazing land is not necessarily leased by acreage, but that horses are grazed on there at some much per horse per day over a period of time?

The Witness: May I have that question again, please?

The Court: Read the question.

(The reporter read the question.)

A. No, I didn't know.

Mr. O'Connor: Q. You don't know that?

A. No.

Q. And you don't know what the rate is for that, do you? A. No.

Q. At whose request did you make the appraisal of this property?

A. The appraisal of this particular piece of property?

Q. Yes. A. At the request of this Court.

Q. At the request of the Court. When did the Court request you to make an appraisal?

A. I wasn't asked by any——

Q. You were asked by whom?

A. I was asked to appear before this Court by Mr. Mathewson.

(Testimony of Guy J. Pedroni.)

Q. Mr. Mathewson, of the United States Attorney's Office? A. Yes.

Q. Whom did you first talk to concerning your appraisal of this pro- [104] perty?

A. No one else.

Q. Just Mr. Mathewson? A. Yes.

Q. You met Mr. Mathewson where? In Salinas?

A. In Salinas.

Mr. O'Connor: That is all.

Mr. Mathewson: That is all.

Mr. O'Connor: Could I ask Mr. Pedroni one question?

Q. Do you know how much this acreage returned in 1934 and 1935, how much was devoted to grazing land?

A. No. I know one portion, that is approximately 10 acres, that is fenced off, where hay has been grown.

Q. Do you know of your own knowledge during that period of time what portion was devoted to raising hay and what portion was devoted to grazing land?

A. I couldn't say specifically for 1934.

Q. You can? A. I cannot.

Q. Say 1935? A. No.

Mr. O'Connor: That is all.

JACOB J. BAUDOUR,

called for the defendant; sworn.

The Clerk: Q. Please state your full name to the Court.

A. Jacob J. Baudour.

Direct Examination

Mr. Mathewson: Q. Mr. Baudour, where do you live?

A. I live twelve miles out of Salinas.

The Court: Speak out louder, just as you would down in Salinas.

A. 12 miles out of Salinas.

Mr. Mathewson: Q. Is that on the River Road?

A. On the River Road, it is.

Q. Do you know where the Frank Dougherty place is? A. Yes.

Q. How far from the Dougherty place do you live? A. Oh, about a mile and a half. [105]

Q. About a mile and a half up the River Road, or down the River Road?

A. Up the River Road.

Q. Is that toward Salinas or away from Salinas?

A. Away from Salinas.

Q. What is your occupation or business?

A. Farmer.

Q. Do you own your own land? A. I do.

Q. Do you farm your own land?

A. Yes, sir.

Q. And do you lease any land which you farm?

A. Yes, I lease quite a bit of land.

(Testimony of Jacob J. Baudour.)

Q. Do you have any land under lease at the present time? A. Yes, I do.

Q. About how much have you?

Mr. O'Connor: That is objected to upon the ground that it is incompetent, irrelevant, and immaterial. A. At the present time——

Mr. O'Connor: Just a minute.

The Court: Lay the foundation. Where is the land? What character of land?

Mr. Mathewson: Q. What character of land do you have under lease?

A. I have sediment land and I have some hay land.

The Court: Q. How many acres do you own altogether?

A. Do I own?

Q. Yes.

A. I own about 30 acres of my own.

Mr. Mathewson: Q. Where is the hay land?

A. The hay land is about three miles from the Dougherty place toward Salinas.

Q. Is that the same type of land? Are you familiar with the type of land in the Dougherty place?

A. Yes, I am.

Q. That is the land immediately around the Dougherty homestead? A. Yes.

Q. How long have you been engaged in the occupation of farming? A. Mostly all my life.

[106]

The Court: Q. Thirty years?

(Testimony of Jacob J. Baudour.)

A. Yes, 50 years. I was born on the farm.

Mr. Mathewson: Q. How much of that time has been spent in farming around Salinas?

A. For the last 15 years I have been on the same place that I am now.

Q. Are you familiar with the rental value of property of the same type as the Dougherty property?

A. Yes.

Q. What, in your opinion, would be the reasonable rental value of 20 acres of the Dougherty property extending from the front of the Dougherty property south along the River Road, together with the barn on the Dougherty property, corral, two small sheds, and the use of water for the purpose of feeding dry stock?

Mr. O'Connor: Just a moment. To which I object upon the ground that is incompetent, irrelevant, and immaterial, and not within the issues of this case.

The Court: Objection overruled. You may answer.

A. Not over $5 an acre.

Mr. Mathewson: Q. That is the annual rent?

A. Yes.

Q. And that includes the barn?

A. That includes barns and buildings.

Q. And the corral? A. Corrals.

Q. And the use of water? A. Yes.

Mr. Mathewson: That is all.

(Testimony of Jacob J. Baudour.)

Cross Examination

Mr. O'Connor: Q. Do you know Mr. Dougherty? A. Yes, I do.

Q. How long have you known him?

A. I have known him for 15 or 16 years.

Q. Did you ever have any difficulties with him?

A. Well, not exactly. I farmed some of his land.

Q. Never had any difficulties with him?

A. No, not—one time [107] there he brought up a suit, but there really wasn't any trial; I just went and gave him his money—a little misunderstanding.

Q. Well, isn't it true that you were farming part of his land there on a crop contract, and he had to sue you to recover money?

A. It was a misunderstanding.

Q. Just a moment. Didn't he sue you to recover the money you owed him?

A. He sued and I paid the money without any trial.

Q. You were sued, and he took a judgment against you? He got a judgment in the Justice's Court in Salinas against you?

A. No, he didn't get a judgment. I just gave the money to the Judge and told him to pass it over to him; I didn't want any trouble.

Q. It was after you had been sued?

A. Yes, he started suit.

Q. Have you been friendly with him since then?

A. Been friendly—we have.

(Testimony of Jacob J. Baudour.)

Q. What have been your relationships? How often have you seen him?

A. Oh, I can't say how often I see him. I go by there; sometimes I see him; sometimes I don't.

Q. How often have you rented land from Dougherty? A. Just the one time.

Q. Isn't it true that he refused to rent you land after that?

A. I never rented from him; I never asked him for it.

Q. You never asked?

A. I never asked him for it.

Q. On what do you base your opinion that the rental value of this land is $5 an acre?

A. Rental of the land?

Q. Yes. A. Not over $5 an acre.

Q. What do you base your opinion upon?

A. Well, the land isn't worth it.

Q. What do you base your opinion on? What facts?

A. Well, it is for farming, the land, is only worth $5, because there is no profit in it. [108]

Q. Do you know what hay it produced in the year 1934 or 1935?

A. As an average crop, it is about a ton to the acre.

Q. About a ton to the acre?

A. A ton to the acre.

(Testimony of Jacob J. Baudour.)

Q. It wouldn't be true, then, that an average crop on that ten acres of land would run about 2½ tons an acre?

A. Not on an average.

Q. Well, would you say it never did run to 2½ tons an acre?

A. Oh, yes, some years they get 2½ tons to the acre.

Q. Do you know anything about the remaining ten acres on that particular piece of land?

A. The ten acres—what did you say?

Q. That isn't in hay?

A. That isn't in hay? Well, I don't know if there is ten acres in there that isn't in hay.

Q. Do you know how many acres are in this particular piece?

A. I don't believe there is over five acres.

Q. You don't believe there are five acres in what? A. On this particular piece.

Q. On the whole place?

A. Well, in the place that there is no hay on, just grazing land.

Q. Are you familiar with the piece of property that we are talking about?

A. Yes, I believe I am.

Q. How large is the entire piece of property?

A. I don't believe it is over ten acres.

Q. You don't believe it is over ten acres?

A. No, sir.

(Testimony of Jacob J. Baudour.)

Q. Supposing the testimony in this case was to the effect that it was 20 acres; would you say that was correct or incorrect?

A. That is not correct.

Q. How do you know it isn't?

A. Because I can tell by my own piece of property.

Q. You can tell what?

A. That there isn't over ten acres.

Q. How many acres of land are there on the Dougherty place?

A. I believe there is around 1400—between 1400 and 1500 acres. [109]

Q. Do you know what particular acreage was leased by Mr. Dougherty to these other people?

A. Well, from what I heard I know it was a piece——

Q. Do you know of your own knowledge?

A. Yes, I think I know.

Q. How many acres were leased by them?

A. He claims—he leased——

Q. Just a moment. I didn't ask you what he claimed; I asked you how many acres were leased by Mr. Dougherty of your own knowledge? Do you know? A. He leased out twenty acres.

Q. Twenty acres. All right. How much is grazing land worth down there in that particular area? How much would you charge on fair grazing land to put in horses to graze? How much would you charge a day for them?

(Testimony of Jacob J. Baudour.)

A. $2 a month is a good price.

Q. Would you say $2 a month would be a good price, is that correct, for each horse?

A. Yes.

Q. For each horse? A. Yes.

Q. How many horses could you graze on ten acres of fair grazing land?

A. By the year? For the year? Not more than one horse.

Q. One horse for ten acres?

A. On that kind of soil.

Q. Just one horse to ten acres?

A. Just one horse to ten acres on that kind of soil.

Mr. O'Connor: That is all.

HERBERT BALTZ,

called for the defendant; sworn.

The Clerk: Please state your full name to the Court.

A. Herbert Baltz.

Direct Examination

Mr. Mathewson: Q. Where do you reside, Mr. Baltz? A. Salinas, California. [110]

Q. What is your occupation?

A. Realtor.

Q. Where do you conduct your business?

(Testimony of Herbert Baltz.)

A. In Salinas and vicinity.

Q. How long have you been engaged in that business? A. 14 years.

Q. What business did you engage in before you engaged as a real estate broker?

A. I was a bookkeeper and field man for N. Wellman Company, wholesale hay, grain and produce.

Q. Are you familiar with the Frank A. Dougherty place located about twelve miles southwest from Salinas on the River Road?

A. Yes, sir.

Q. Are you familiar with the land in front of the buildings on the Dougherty place and the land extending down the River Road toward Chular?

A. Yes, sir.

Q. Are you familiar with similar land in the community? A. Yes, sir.

Q. Are you familiar with the rental values of that land? A. Yes, sir.

Q. Are you able to form an opinion as to the reasonable rental value of approximately 20 acres of the Dougherty place located in front of the Dougherty building? A. Yes, sir.

Q. Extending down the road, together with a barn, corral, two sheds, and the use of water for the purpose of feeding dry stock?

A. Yes.

(Testimony of Herbert Baltz.)

Q. What is your opinion of the reasonable rental value?

Mr. O'Connor: Just a moment. To which I object upon the ground that it is incompetent, irrelevant, and immaterial, not within the issues of this case.

The Court: Objection overruled. You may answer.

Mr. Mathewson: Q. What is your opinion?

A. $170 per year.

Mr. Mathewson: That is all.

Cross Examination

Mr. O'Connor: Q. Upon what do you base that opinion, Mr. Baltz?

A. On a calculation of figures derived from income of hay land, grazing land, and buildings.

[111]

Q. What figures do you refer to, specifically?

A. What do you mean?

Q. What figures are you referring to? You said that you based that upon a calculation of figures. I am asking you what particular figures you are referring to.

A. I refer to 15 acres of hay land capable of producing on the average 1 ton of hay per acre on which the owner would receive the usual crop share of one quarter per ton, based on the average price $16 per ton delivered and put in the barn,

(Testimony of Herbert Baltz.)

which would produce $4 per year per acre. That multiplied by 15 acres, which is the approximate hay land produces $60.

Q. Now, then, on what do you base your statement there was approximately fifteen acres of hay land involved here?

A. From my observation I assume, or I have determined that the segregation of the land is fifteen acres hay land and five acres grazing land.

Q. When did you make that determination?

A. Yes, sir.

Q. Did you go onto the property yesterday?

A. Yes, sir.

Q. Do you know what portion of that property was used for hay in 1934 and 1935?

A. I was on the ground at that time.

Q. In 1934 and 1935?

A. Yes, sir, in '34.

Q. In '34.

A. At the time the place was demolished.

Q. The place was—— A. At the time——

Q. The still?

A. The trouble, the still demolished.

Q. You were out there? A. Yes, sir.

Q. What were you doing out there?

A. I went out there at the time they auctioned off the materials.

Q. At the time they auctioned some of the materials seized from the still? A. Yes, sir.

(Testimony of Herbert Baltz.)

Q. In basing your figures, you are assuming, I assume, when you give that rental of $170 a year—I will withdraw that question. What is the usual crop share that goes to the owner of property in land [112] of this type?

A. One-quarter share.

Q. One-quarter share. In basing your figure of rental at $170 a year, I assume that you are assuming that the owner would receive one-quarter share, is that correct? A. Yes.

Q. Do you know whether or not he was to receive it in this particular case?

A. No, I don't know that.

Q. Supposing that he didn't receive it, what would be your idea of a fair value of the rental of that land? A. Not over $200.

Q. Isn't it a fact that the rent down there is not a quarter share to the owner, but a third share to the owner?

A. In more cases it is one-quarter in grazing land.

Q. We are talking about hay land.

A. In hay land, yes, because the owner has a chance to sell the stubble, which is another little profit—or the tenant, I should say.

Q. Now, then, as I understand your testimony, if the owner did not receive a share of the crop a fair rental would be $200 for how many acres?

A. For twenty acres.

(Testimony of Herbert Baltz.)

Q. And how many acres of that would you assume to be in hay? A. 15 acres.

Q. All right. What would be the value of the return that a man would receive from five acres of grazing land?

A. For cows or horses?

Q. For horses. A. $2 an acre per year.

Q. $2 an acre per year? A. Yes.

Q. Supposing that he was renting not on an acreage basis, but on the basis of so much a head per horse, what would you say would be a fair return that he should get?

A. For just the use of the land, I would still say $2 per acre.

Q. I say, assuming that he is not renting it upon that basis, but is charging per day per horse, what would you say would be a fair charge per day per horse?

A. I couldn't answer that; that is in the [113] category of a riding academy.

Q. You don't know, do you?

A. I don't know, no, sir.

Q. By the way, whom did you first discuss the question of your becoming a witness in this case with?

A. I don't know the gentleman's name.

Q. Mr. Gaines, who sits here? A. Yes.

Q. When did you talk to Mr. *Gains* first?

A. About a month ago.

(Testimony of Herbert Baltz.)

Q. What would you assume would be the production of hay on that acreage per year in tonnage?

A. Well, the other day when I passed it, there is about a ton of hay in the cob there now. As I remember '34, it was a hay year, and it should have been about two tons an acre.

Q. Two tons of hay per acre? A. Yes.

Q. Two tons of hay per acre would be how many tons? A. 30 tons of hay.

Q. How much was hay selling for in that year?

A. $16 per ton, delivered and put in the barn.

Q. $16 a ton, so that hay land would produce a return of $480, is that correct? A. Yes.

Q. During the year 1934?

A. 16 multiplied by 30.

Q. Now, then, do you know whether or not, or would you say that the payment of a dollar a day for ten horses as grazing land would be a fair return or would be a fair price?

A. A dollar a day?

Q. For ten horses, ten mares.

A. Strictly for grazing, without any care?

Q. Grazing, water—water and grazing land.

A. $10 a day for ten horses?

Q. No; $1 a day for ten horses.

A. It would be a fair wage, yes.

Q. It would be a fair return? A. Yes.

Q. You wouldn't say it was excessive, would you? A. No.

Mr. O'Connor: That is all. [114]

(Testimony of Herbert Baltz.)

Redirect Examination

Mr. Mathewson: Q. Mr. Baltz, how long could you pasture ten horses on the property in the front of the Dougherty place?

A. Are you referring to the five acres?

Q. Yes. A. Or the 20 acres?

Q. 5 acres. A. About a week.

Mr. Mathewson: That is all.

JULIUS BIANCHINI,

called for the defendant; sworn.

The Clerk: Q. Please state your full name to the Court?

A. Julius Bianchini.

Direct Examination

Mr. Mathewson: Q. Mr. Bianchini, where do you now live? A. El Cerrito.

Q. What address in El Cerrito?

A. 351 San Pablo Avenue.

Q. You were one of the defendants in the trial for the operation of the distillery on the Frank Dougherty place? A. Yes, ma'am.

Q. That distillery was seized when, do you recollect? A. The day?

Q. About the time the distillery was seized.

A. Oh, it is 1934 in November—part of November, sometime.

(Testimony of Julius Bianchini.)

Q. Is that when the distillery was seized?

A. That is the time we put up the still.

Q. You put the still sometime in November, 1934? A. That's it.

Q. Do you recollect when you first went upon the Dougherty property? A. Yes.

Q. When did you first go out there?

A. I don't remember exactly; in October—the last of October and the first of November; something like that.

Q. 1934? A. 1934. [115]

Q. With whom did you go?

A. Mr. Rodoni and Biagi.

Q. About what time of the day did you go out there?

A. I have forgotten; I think it was the forenoon.

Q. When you went out there did you see Mr. Dougherty?

A. Mr. Rodoni introduced me to Mr. Dougherty.

Q. Where was Mr. Dougherty?

A. Right in the yard.

Q. In the front yard? A. Yes.

Q. At that time did you have any conversation or did any one of the three of you have any conversation with Mr. Dougherty with respect to renting his property?

A. Yes, we had conversation to rent the place for the still.

Q. Did you tell him at the time that you wanted to rent the place for a still?

(Testimony of Julius Bianchini.)

A. We tell Mr. Dougherty we want to rent the place for the still and then we make arrangement to have a place for the still.

Q. Did you discuss the property that yon wanted to rent? A. We decided just the barn.

Q. You told him you wanted the barn?

A. The barn, and to go through for the gate to the barn.

Q. How did you determine how large that property was?

A. Oh, it is hard to say; I don't know; about 10 acres, 5 acres; I don't know.

Q. You were interested in the barn?

A. Just in the barn.

Q. Did you discuss with Mr. Dougherty the rental that you would pay for the place?

A. $125 a month.

Q. Did you prepare a written lease?

A. We prepared a written lease the same time we go in there.

Q. Who prepared the lease?

A. Me and Biagi.

Q. Where did you prepare it?

A. In San Juan.

Q. After you prepared the lease did you present it to Mr. Dougherty?

A. Give to Mr. Dougherty. [116]

Q. And did Mr. Dougherty sign it?

A. I didn't see him at the time he signed it. Mr. Dougherty get the lease and maybe he make—

(Testimony of Julius Bianchini.)

he read to somebody to see if it is all right, and I don't sign it. And Mr. Rodoni signed the lease. We told Mr. Rodoni to sign.

Q. You told Mr. Rodoni to sign it?

A. Yes.

Q. You gave it to Dougherty and you didn't see him sign it?

A. No, I don't see Mr. Dougherty sign it.

Q. Do you remember for how long a period of time you wanted this property?

Mr. O'Connor: Just a moment. I object to that upon the ground that it is incompetent, irrelevant, and immaterial what period of time he wanted it for, not binding upon the plaintiff in this case.

The Court: You may develop whatever was said and done at that time and place. Develop the conversation whatever it was.

Mr. Mathewson: Q. Did you have any futher conversation with Mr. Dougherty with respect to the use of his property?

A. We had conversation that day and then we came back again and make arrangements.

Q. Did you make any arrangements or have any conversation with Mr. Dougherty for the use of any houses on the property where men could stay?

A. We had conversation to have the little cabin on the side of Frank Dougherty's house.

Q. He told you could have that place for men to stay? A. Yes, sir.

(Testimony of Julius Bianchini.)

Q. After you leased the property what did you do? A. After we leased the property?

Q. Yes.

A. We started work to put up a still there.

Q. Did you move a still into the place?

A. Yes, sir.

Q. About how long did it take you to set it up, do you remember?

A. Oh, to make—to set up and start to run, I think around 30 days.

Q. During that period of time did you go on the property? A. Yes, [117] sometimes

Q. About how often did you go on the property?

A. Oh, time before run I go every day to work, every night, you know, to set up.

Q. How long did the still operate?

A. First time operate about 21 days or 22; I don't remember exactly.

Q. And how long was it before it started to operate again? A. Over four months.

Q. Over four months. The second time it operated how long did it operate?

A. Altogether got thirteen days.

Q. Do you remember how much alcohol you produced there per day?

A. Oh, between 50 and 55 cans.

Q. 5-gallon cans? A. Yes.

Q. Did you make any application for power on the place?

A. Yes, I make application two times.

(Testimony of Julius Bianchini.)

Q. I show you Defendant's Exhibit B in evidence and refer particularly to application No. 35-101 dated April 30, 1935, and application No. 34-283, dated November 5, 1934, and ask you to examine those and tell me whether or not that is your signature on the application. A. I can't read.

Q. You can't read? A. No.

Q. Can't you write your name?

A. Yes, I can write my name; I can read it.

Q. Will you look at that and tell me whether that is your name?

A. What do you mean, what is the name?

Q. I am calling your attention now to this pencil name, "R. Bini" and ask you if you signed that.

A. I signed that.

Q. Did you sign the name "R. Bini" on Application No. 34-283? A. Yes, I signed again.

Q. You signed both of those applications?

A. Yes.

Q. Who paid Mr. Dougherty the rent?

A. I paid. [118]

Q. Did you pay him, yourself? A. Yes.

Q. How often did you pay him?

A. I paid two months first time and one month the last time. We got three months.

Q. You paid him a total of three months?

A. No, I paid $125 at a time.

Q. You paid him $125 each time?

A. Each time.

Q. You paid him three times?

(Testimony of Julius Bianchini.)

A. Three times.

Q. Twice in 1934? A. Yes.

Q. And once when you started up again?

A. That's it.

Q. Did you ever see Mr. Dougherty around his place while you were there?

A. I seen him around the yard, yes.

Q. And do you recollect what time of the day you saw him?

A. Oh, most was there noon time.

Q. Usually around noon time? A. Yes.

Q. Do you remember whether Mr. Dougherty was ever around his place at noon time when the still was operating?

A. Yes, he was around—not around the still; he was in the yard over the house.

Q. Did Mr. Dougherty ever come around the still at all?

A. Not at the time I was there.

Mr. Mathewson: That is all.

Cross Examination

Mr. O'Connor: Q. Just a moment, please.

A. All right.

Q. You have been convicted of a felony, haven't you?

The Court: You will have to iron that out a little, "felony" he probably doesn't understand.

(Testimony of Julius Bianchini.)

Mr. O'Connor: Q. Do you know what a felony is? Do you know what a felony is? A. No.

Q. Are you a citizen? You pleaded guilty here in this court to violating the Internal Revenue Laws with respect to stills, didn't you?

A. Yes, sir; I served my time for that.

Q. You pleaded guilty to it, didn't you? [119]

The Court: He asked you if you pleaded guilty.

A. Yes, I plead guilty.

Mr. O'Connor: Will it be stipulated that the witness has been convicted of a felony, Mr. Mathewson?

Mr. Mathewson: Yes.

Mr. O'Connor: Q. And you testified as a witness for the Government at the time Mr. Dougherty was tried in the criminal case, didn't you?

The Court: Did you testify? I don't recall. Did he?

Mr. O'Connor: Yes, he testified.

Mr. Mathewson: He testified in the criminal case.

A. I think I make a mistake that time.

Mr. O'Connor: Q. You made a mistake that time. What was the mistake you made that time?

A. I make mistake; I don't say the truth.

Q. You didn't tell the truth. In what way didn't you tell the truth that time?

A. Well, because I don't want to plead guilty my case.

Q. What?

(Testimony of Julius Bianchini.)

A. I don't want to plead guilty in my case.

Q. You already had pleaded guilty before you testified, didn't you? A. No.

Mr. Mathewson: No.

Mr. O'Connor: Q. All right, Mr. Bianchini, didn't you on the 15th day of January, 1936, plead guilty in this court before Judge Roche?

Mr. Mathewson: The question has been already asked and answered. A. Yes.

Mr. Mathewson: The witness has said that he did plead guilty.

Mr. O'Connor: That isn't the question. He said he hadn't pleaded guilty until after the case was tried.

The Court: I think there was some confusion. Whatever the record discloses, develop if that was the fact.

Mr. O'Connor: Q. Did you plead guilty on January 15, 1936, before [120] his Honor, Judge Roche?

A. I don't remember the date, exactly. I plead guilty my case.

Q. You pleaded guilty before the other case went to trial and then you came here and testified before the jury, didn't you?

A. No, I don't remember that.

Q. You didn't testify?

The Court: Before a jury, a jury sitting here, you testified?

(Testimony of Julius Bianchini.)

A. I testified that; I don't know my case was already gone.

Mr. O'Connor: Q. You had pleaded guilty already but you hadn't been sentenced yet, isn't that correct? You had pleaded guilty but the Court had not sentenced you, isn't that correct?

A. That is correct.

Mr. Mathewson: That is stipulated.

Mr. O'Connor: Q. Do I understand you to say now that you did not tell the truth at the last trial?

A. No.

Q. Why? A. Because I make a mistake.

Q. What was the mistake you made?

The Court: Q. What was the mistake you made?

A. The mistake. All right, that time I testified I think the lease is Frank Dougherty, the lease he have, but the lease I see he don't say Frank. Now, I got to say the truth.

Q. In other words, at that time you said the lease said Frank Dougherty?

A. That is what I said.

Q. But the lease didn't say Frank Dougherty?

A. No.

Mr. Mathewson: I think counsel has misunderstood the witness. I think the witness said that he thought the lease would save Frank Dougherty.

The Court: Q. Did you say "save"?

A. Yes.

Mr. Mathewson: And it didn't save him.

Mr. O'Connor: Well, it did save him. [121]

(Testimony of Julius Bianchini.)

Mr. Mathewson: Well, I think it was the efforts of counsel rather than the lease.

The Court: I have no doubt about it, myself.

Mr. O'Connor: Q. Well, at the last trial of this case, Mr. Bianchini, in any event, didn't you testify that when you, Rodoni and Biagi went to see Mr. Dougherty about this place you told him you wanted to run cattle? Didn't you testify to that at the last trial?

A. Yes, I testified to that.

Q. You testified to that on the last trial?

A. Yes.

Q. And didn't you testify on the last trial that you did not tell Dougherty you were going to make liquor there?

A. We talked to Dougherty we going to put up a still.

Q. Wait a minute; I am not asking you that. When you testified before his Honor, Judge Roche, at the last trial, didn't you tell his Honor and the jury that when you talked to Dougherty you did not tell Dougherty you were going to run a still there; isn't that true? A. Yes.

Q. That is true? A. That is true.

Q. Now, you want the Court to understand that at the time you talked to him you did tell him you were going to run a still; is that correct?

A. Well, because that time I make mistake.

Q. You made a mistake then but you are not making any mistake this time? A. That's it.

(Testimony of Julius Bianchini.)

Q. Who have you talked to before you became a witness in this case here about this case?

The Court: He wants to know whom you talked to.

A. He wants to know? Mr. Mathewson, there.

Mr. O'Connor: Q. Mr. Mathewson; whom else?

A. The other fellow.

Q. You mean Mr. Gaines? A. Yes. [122]

Q. When did you talk to Mr. Gaines first about this case?

A. Just a minute. No, it wasn't for this case; it was another case.

Q. Do you remember that?

A. Yes, he came over and saw me once. I got mixed up.

Q. You gave him the story?

A. This fellow came over to see me twice.

Q. He came over to see you twice? A. Yes.

Q. He talked to you about the Dougherty case?

A. Yes.

Q. When did he talk to you about the Dougherty case? A. Last week sometime.

Q. Tell us the conversation you had with him?

A. I don't know it is right to tell them to you or not.

Mr. Mathewson: I think you had better unless the Court tells you not to.

The Court: Tell him all about it.

A. Well, he had a conversation, he wanted to find out the truth.

(Testimony of Julius Bianchini.)

Mr. O'Connor: Q. The truth. What did you tell him? Did you tell him you didn't tell the truth the last time, or did he tell you you didn't tell the truth the last time?

A. No, you know what I tell you. I tell him everything what I told last time, and this morning I decided to tell the truth.

Q. To tell the truth? A. Yes.

Q. In other words, when Mr. Gaines talked to you you told him the same thing you told him the last time? A. Yes.

Q. This morning you thought you would tell the truth. Before you determined to tell the truth this morning whom else did you talk to?

A. Nobody else.

Q. Did you talk to Rodoni?

A. I see Rodoni, yes.

Q. Did you talk to Rodoni?

A. I don't talk about the case.

Q. You didn't talk about the case at all?

A. No. [123]

Q. Weren't you talking to him about the case in the lavatory outside? A. No.

Q. You were talking in there?

A. I was talking, not about the case.

Q. Mr. Gaines was in there with you, wasn't he, isn't that true?

A. I don't talk about the case.

Q. Mr. Gaines, Mr. Rodoni, and you were in the lavatory together?

(Testimony of Julius Bianchini.)

A. I don't was in the lavatory myself; you are mistaken.

Q. You weren't? In any event, you didn't tell the truth last time and you are telling the truth now; is that correct? A. Correct.

Q. Now, then, didn't you testify at the last trial of this case that you only paid Dougherty on the one occasion? A. I paid Dougherty.

Q. I didn't ask you what you paid him; I am asking you what you testified to at the last trial. Didn't you at the last trial testify that you only paid him once, and that you paid him $115?

The Court: He wants to know if you testified—

A. I don't remember that.

Q. Would you say that you did or you did not?

Mr. Licking: If the Court please, I would suggest that counsel show him the transcript.

Mr. O'Connor: I haven't got the transcript. If necessary, I will ask the Court to continue the case until I can get it.

Q. Did you testify at the last trial that you paid Dougherty $125 on three different occasions?

A. I don't remember.

Q. Would you say that you did or you did not?

A. I say I don't remember; a long time.

Mr. O'Connor: That is all.

Redirect Examination

Mr. Mathewson: May I ask one question?

The Court: Yes. [124]

(Testimony of Julius Bianchini.)

Mr. Mathewson: Q. Mr. Bianchini, you talked to me twice before you came over here, did you not?

A. Yes.

Q. Each time that you talked to me you told me, did you not, that you never talked to Dougherty about setting up the still? A. Yes.

Q. You also told me that you agreed to rent the place for $400? A. Yes.

Q. The rental was $20 a month? A. Yes.

Mr. O'Connor: Let him testify as to what he told you. It is redirect examination; it isn't cross examination.

Mr. Mathewson: Q. When did you first tell me, Mr. Bianchini, that you told Dougherty that you were going to set up a still there?

A. The first I told you?

Q. Yes.

A. We rent that place for dry stock, you remember?

Q. Well, when did you first tell me that?

The Court: Q. When did you first tell Mr. Mathewson?

A. A little over a week, I think. I don't remember the night you come over to——

Mr. Mathewson: Q. No, no.

Mr. O'Connor: Let him answer the question.

Mr. Mathewson: Q. When did you first tell me that you told Dougherty when you rented the place that you were going to set up a still?

A. The night you came over there, over where I live.

(Testimony of Julius Bianchini.)

Q. Do you understand me, Mr. Bianchini? When did you first tell me—when did you first tell me that you told Dougherty you wanted the place for a still?

A. Oh, the first time I told you, this morning, over here.

Q. This morning, where?

A. This morning right in the corner, there.

Q. When did you first tell me that you agreed to pay Dougherty the rent of $125 a month?

A. This morning.

Mr. Mathewson: That is all. [125]

Mr. O'Connor: May I see that assessment? I would like to ask some further questions.

Recross Examination

Mr. O'Connor: Q. Where are you living now?

A. In El Cerrito.

Q. The Collector of Internal Revenue made an assessment of tax against you arising out of the operation of this still, didn't he?

A. Investigation, yes.

Q. He made an assessment against you; you were notified that you owed the Government over $7000 in taxes, weren't you?

A. When I get it, I pay.

Q. As a matter of fact, you were notified by the Collector of Internal Revenue that they had assessed over $7000 in taxes against you; isn't that true?

A. I guess so. I don't know exactly how much.

(Testimony of Julius Bianchini.)

Q. You know that you are supposed to owe the Government over $7000 in taxes for operating this still down there on the Dougherty ranch, don't you know that? A. (No answer).

Q. Isn't that true? A. I don't know.

Q. You don't know. Haven't you ever received a notice from the Collector of Internal Revenue that he held a tax bill against you for over $7000 because of the operation of this still? Didn't you receive a notice from the Collector of Internal Revenue?

A. I received a notice; I don't remember how much.

Q. You also know that your other co-defendants in the case, Rodoni, Guiseppi Guinto, Guiseppi Biago and George Harrison, also were assessed the same amount of tax, don't you, the same tax that they are trying to collect from Dougherty? You know that? Don't you know that? A. Yes.

Q. Do you know that if Mr. Dougherty pays any part of that tax that makes less tax for you to pay, don't you? A. No, I don't know that. [126]

Q. You don't know that? A. No.

Q. You didn't know that Mr. Dougherty had already paid over $3700 of that tax and that would come off your tax bill, did you?

Q. If I told you it were true, would that make any difference in your testimony? A. No.

Mr. O'Connor: No, it would not. All right, that is all.

GUISEPPI BIAGI,

called for the defendant; sworn.

The Clerk: Please state your full name to the Court. A. Guiseppi Biagi.

Direct Examination

Mr. Mathewson: Q. Mr. Biagi, where do you live? A. San Mateo.

Q. Where in San Mateo?

A. 209 26th Avenue.

Q. You pleaded guilty to a charge of operating a still in the Frank Dougherty place, did you not?

A. Yes, sir.

Q. Do you recollect when you first went on the Dougherty place? Do you remember when you went the first time on the Dougherty place?

A. Yes, I think it was on Monday.

Q. Do you remember what year it was?

A. 1934.

Q. About what time of the year?

A. Between October—last part of October, I think; I don't remember the date, because that is too far back.

Q. Did you see Frank Dougherty on the place where you went there? A. Yes, sir.

Q. Will you relate to the Court—will you tell the Court what happened when you went there?

A. We went there, and Rodoni introduced me, because I never known him, and we had a conversation to do what we done.

Q. What did you say to Dougherty and what did Dougherty say to you? [127]

(Testimony of Guiseppi Biagi.)

A. We started, before we talking, we say we going to put dry stock. I ask if we have to say the truth, you can't go any place, say anything like that.

Mr. O'Connor: May I have that answer?

A. And on top was the truth, what you going to do?

Mr. O'Connor: Just a minute.

(The reporter read the answer of the witness.)

Mr. O'Connor: I move—let it stay.

Mr. Mathewson: Q. Did you tell Mr. Dougherty what you wanted that place for?

A. Yes, sir.

The Court: Speak up. A. Yes, sir.

Mr. Mathewson: Q. What did you tell him you wanted the place for? A. For the still.

The Court: Q. For what?

A. For the still.

Mr. Mathewson: Q. How much did you agree to pay him for the place?

A. I think I said the other time in front the jury trial——

Mr. O'Connor: Just a moment. I object to that, if your Honor please, upon the ground that it is not responsive to the question.

The Court: Read the question.

(The reporter read the question.)

A. I said like I want to say, see. I think I remember I told you in the front the truth at the time.

(Testimony of Guiseppi Biagi.)

Mr. O'Connor: I object to that on the ground that it is not responsive.

The Court: You answer that question then explain it any way you want. Tell the conversation.

A. 125 a month.

Mr. Mathewson: Q. Did you ever pay him any rent? A. Not me. [128]

Q. Did you have any conversation about the preparation of a lease?

A. No, I think I never had any myself.

Q. You never had any conversation about the preparation of a lease? A. No.

Q. Did you tell Mr. Dougherty how much land you wanted?

A. Oh, we say we want to—we was interested in the barn, the front of the barn, because after we say we make the lease. He says I can put a little big, put about 20 acres.

Q. Did you have any conversation with Mr. Dougherty about using any cabin on the place for living quarters?

A. The pump; nothing else.

Q. Water. Did you ask him whether you could have any place to stay there?

A. Not me. Maybe Bianchini asked him. He was the one that did most of the outside work.

Q. After you had the lease did you set up a still?

A. Yes, sir, started right in few days before we was working.

(Testimony of Guiseppi Biagi.)

Q. How long did it take you to set up the still?

A. It take between 25 and 30 days before we got started.

Q. How much of that time did you work on it?

A. I worked every day.

Q. You worked every day?

A. Every day.

Q. When would you come to work?

A. Early in the morning.

Q. Early in the morning?

A. Go out late at night.

Q. How long did the still operate after you got it up?

A. I don't remember sure how many days it operate first time, about 22, 21; I don't remember exactly.

Q. Why did the still shut down the first time, do you know?

A. Because the stuff was too cheap; we can't make any profit.

Q. By "the stuff" do you mean alcohol?

A. Alcohol, yes, it was too cheap; we can't make any profit.

Q. Did you have any trouble with your equipment?

A. Yes; we had a trouble on the boiler, too. [129]

Q. What happened to the boiler?

A. It burned out.

Q. What did you do with it?

(Testimony of Guiseppi Biagi.)

A. I leave man there to take them outside and replace another one. I was outside looking for the other one, myself.

Q. When you shut down the still what did you do with the equipment?

Mr. O'Connor: That is objected to upon the ground that it is incompetent, irrelevant, and immaterial.

A. Take them away.

Mr. O'Connor: Wait a moment, please, Mr. Bianchini—whatever your name is. Object to that on the ground that it is incompetent, irrelevant, and immaterial.

The Court: What was the question?

(The reporter read the question.)

Mr. Mathewson: You see, your Honor, they started the still——

Mr. O'Connor: I withdraw the objection. You are referring to the time when it was shut down?

Mr. Mathewson: Yes.

Mr. O'Connor: I withdraw the objection.

The Court: Answer the question.

A. We moved the still away. We just leave boiler and the empty tank inside the barn and the pot from the still.

Q. Did you come back later and set up the still again? A. Yes.

Q. About how much later?

A. Oh, about three months, or something like

(Testimony of Guiseppi Biagi.)

that; I don't remember; three and a half or four months.

Q. The second time you set up the still how long did you operate? A. Thirteen days.

Q. How much alcohol did you produce in thirteen days?

A. We produced between 50 and 55 cans a day.

Q. Were you around the place while it was operating the second time? A. Oh, sure.

Q. How often were you around there?

A. I usually around every morning. [130]

Q. Every—— A. Every morning.

Q. Every morning? A. Yes, sir.

Q. What time did you go in there in the morning?

A. I used to get the stuff and take them out.

Q. Do you remember about what time in the morning it was?

A. Oh, it was all the time before daylight.

Q. It was before daylight? A. Yes.

Q. You would go in in the morning and take the stuff out before daylight? A. Yes.

Q. Did you ever see Mr. Dougherty around the place while the still was operating?

A. Not around the barn.

Q. Not around the barn?

A. I saw him in the yard.

Q. You saw him in his yard? A. Yes.

Mr. Mathewson: That is all.

(Testimony of Guiseppi Biagi.)

Mr. O'Connor: May we take a short recess at this time, if your Honor please?

(After recess:)

Cross Examination

Mr. O'Connor: Q. Where do you live now, Mr. Biagi? A. San Mateo.

Q. Whereabouts in San Mateo?

A. 209 26th Avenue.

Q. How long have you lived there?

A. About 15 months.

Q. Have you ever been convicted of a felony?

A. What?

Q. Have you ever been convicted of a felony? Do you know what a felony is?

Mr. Mathewson: We will stipulate that he was convicted of a felony in this Dougherty case.

Mr. O'Connor: Q. You pleaded guilty?

Mr. Mathewson: He has so testified.

Mr. O'Connor: This is cross examination. I have a right to [131] cross examine the witness.

Q. You pleaded guilty in the case of United States v. Dougherty and others when you were charged with the operation of a still, didn't you?

A. Yes.

Q. You received a jail sentence, didn't you?

A. Yes.

Q. What was your sentence?

A. Same thing; one year.

(Testimony of Guiseppi Biagi.)

Q. Prior to that time you had been convicted of a violation of the liquor laws before that, hadn't you?

Mr. Licking: To which I object on the ground it is immaterial unless that violation was also a felony.

Mr. O'Connor: I propose to show that it was.

Q. You were convicted of a violation of the California State Sale Law? A. Yes.

Q. And you did time in the Hollister County Jail for it? A. Yes.

Mr. Licking: I move that that testimony be stricken on counsel's own statement, because under the laws of the State of California no offense is a felony when the sentence is to the county jail.

Mr. O'Connor: I will take a ruling.

The Court: Objection sustained.

Mr. O'Connor: Q. Were you ever convicted of any other violation of the liquor laws other than the violation when you pleaded guilty in this case?

Mr. Licking: To which I object on the ground that it is immaterial unless it is confined to a felony.

The Court: Objection sustained.

Mr. O'Connor: Q. Were you ever convicted of any felony other than the felony in this particular case? A. Yes, another in 1931.

The Court: What was that? A. 1930.

Q. What happened?

A. I got sent to some jail—county jail. [132]

Mr. O'Connor: Q. Where? What court?

(Testimony of Guiseppi Biagi.)

A. In Judge St. Sure.

Q. For violation of the Internal Revenue Laws with respect to sale, wasn't it? A. Yes.

Mr. O'Connor: That was a felony.

Q. Now, then, whom have you talked to about your testimony in this case? A. What?

Q. Whom have you talked to about your testimony in this case?

The Court: Whom have you talked to?

A. Mr. Mathewson.

Mr. O'Connor: Q. Whom else?

A. Mr. Gaines.

Q. They came down to your house in San Mateo, didn't they? A. Yes.

Q. When they talked to you down there did you tell them at that time that when you had the conversation with Dougherty about leasing the place that you told Dougherty you were going to operate a still there? A. I told him at that time, yes.

Q. How long ago was that?

A. Friday night.

Q. And at that time what did you tell them?

A. What?

Q. What did you tell them?

A. I told him we pay $125 a month for rent.

Q. Well, what did you tell them about a conversation you had with Dougherty the first time you talked to Dougherty?

A. I say I never talked much with Dougherty. I told him the same thing I told here.

(Testimony of Guiseppi Biagi.)

Q. That you never talked to Dougherty?

A. Most of the talking Bianchini and Rodoni.

Q. Were you present?

A. Yes, I was present.

Q. What conversation did you tell them was had between Dougherty, Rodoni and Bianchini on the first time you talked to Dougherty concerning the lease of these premises?

A. I don't remember my conversation. I told them I don't remember what conversation we had.

Q. You told them you didn't remember?

A. Yes.

Q. Did you tell them you told Dougherty that you were going to use the barn to operate a still in?

A. No, I told them I don't [133] remember.

Q. Do I understand you to here testify today, your present testimony to be, that when you talked to Dougherty you told Dougherty you were going to operate a still there?

A. The other guys told him, yes.

Q. Did you hear him tell him?

A. No, I don't think so.

Q. You didn't hear anyone tell Dougherty that a still was going to be operated there?

A. I don't remember exactly; it is too far back.

Q. At the last trial you testified that you did not tell Dougherty you were going to operate a still, but that you told him you were going to raise chickens and run cattle; didn't you testify to that on the last trial? A. I don't remember.

(Testimony of Guiseppi Biagi.)

Q. Would you say that you did not?

A. I say I don't remember.

Q. You don't remember whether you did, or not? A. Whether I did, or not.

Q. Now, do I understand it to be your testimony now that you did not tell Dougherty that you were going to run a still there?

A. What do you mean?

Q. Do I understand you to now testify today that when you talked to Dougherty about renting these premises that you did not mention a still to him?

Mr. Licking: I submit, your Honor, that the question, while perfectly phrased for another witness, is obviously to this witness unintelligible.

The Court: Q. Did you hear this conversation?

A. I think I heard the conversation; I know was one talking out there.

Q. What do you remember was said?

A. I remember somebody say for that.

Q. Somebody said what?

A. For the operation of the still.

Q. When? A. When we went to see.

The Court: Proceed.

Mr. O'Connor: Q. Told that to whom?

A. To Dougherty. [134]

Q. When was that?

A. The first time we went to see or the second.

Q. Who said that? A. What?

Q. Who said that to Dougherty?

(Testimony of Guiseppi Biagi.)

A. Bianchini or Rodoni, one of the two.

Q. You are sure of that?

A. I am pretty sure.

Q. Now, didn't you testify at the last trial that they didn't tell him that?

A. I don't remember that I testified to that or not.

Q. You did testify at the last trial, didn't you?

A. Yes, I testified at the last trial.

Q. Do you remember testifying at the last trial that you told Dougherty that you wanted the place to raise chickens on and run cattle? Do you remember testifying to that?

A. Yes, we told him that, too.

Q. Do you remember testifying at the last trial that you never mentioned the still to him?

A. I don't know if I said that or not.

Q. You don't know whether you said that, or not. Now, there has been assessed against you a tax. A. I know that.

Q. How much is the tax assessed against you?

A. Seven thousand something; I don't know.

Q. Has any of your property been seized?

A. I haven't got any property.

Q. Did you consult a lawyer concerning it?

The Court: Q. Did you talk to a lawyer?

A. No, I never talked to anyone. Investigators came over to see me about it, six or seven months ago, about it.

(Testimony of Guiseppi Biagi.)

Mr. O'Connor: Q. You know, do you not, that the same amount of tax that is assessed against you has also been assessed against the other defendants, don't you? A. Yes.

Q. You know that? A. I know that.

Q. And you know that if the Government collects any part of the tax [135] from anybody it takes the amount off your tax?

A. I don't know that.

Q. You don't know that? Don't you know that the tax is assessed jointly against all of you?

A. Yes, I think it be the same one every boy; I don't know if you collect one take if off from the other.

Q. You don't know that?

A. I don't know that.

Q. Supposing I told you that that was the fact; that if the Government successfully collected any tax from Dougherty that they would cut down your tax; would that make any difference in your testimony?

Mr. Licking: It seems to me that question is immaterial, because it presupposes something which the witness knew before he testified about something which is assumed to be a fact by counsel now.

The Court: The only purpose of this testimony, I take it, is to show the interest of this witness.

Mr. O'Connor: That is correct.

The Court: I will permit the answer. The reason for his testimony he has given.

(Testimony of Guiseppi Biagi.)

(The reporter read the last question.)

The Court: Would that make any difference in your testimony—what you are saying here?

A. No, I try to say my best truth what I can remember.

Mr. O'Connor: Q. Did you ever pay any money to Mr. Dougherty? A. No, sir.

Q. Did you ever see any money paid to him?

A. Sure, I give it to Rodoni.

Q. You gave it to whom? A. Rodoni.

Q. Did you ever see Rodoni give it to Dougherty? A. No.

Q. You don't know whether Rodoni ever paid him or not, then, do you, of your own knowledge?

A. I don't know.

Q. You don't know?

A. He say he paid. [136]

Q. Irrespective of what he said, you weren't present and you don't know whether he paid or not, do you? A. No.

Q. Who was the owner of that still?

Mr. Mathewson: I object to the question on the ground that it is improper cross examination.

The Court: I will allow it. Who was the owner.

A. Rodoni used to own that.

Mr. O'Connor: Q. Rodoni was the owner of the still? A. Before.

Q. I am not talking about it before; after you started to operate it? A. Me and Bianchini.

Q. You and Bianchini. Was anybody else an owner besides you? A. No, sir.

(Testimony of Guiseppi Biagi.)

Q. You were the two proprietors?

A. Yes, sir.

Q. What was Rodoni? Merely an employee?

A. Employee.

Q. And the other men that were working on the still were mere employees? A. Employees.

Q. During the whole time that that still was there you and Bianchini were the owners and proprietors of the still? A. Yes, sir.

Q. Did Dougherty have any interest in the still?

A. No, sir.

Q. And did you have any agreement with Dougherty whereby he was to receive any profits of the still? A. No, sir.

Q. Was he to take any of the losses on the still?

A. No, sir.

Mr. O'Connor: That is all.

ANGELO RODONI,

called for the Defendant; sworn.

The Clerk: Please state your full name to the Court. A. Angelo Rodoni. [137]

Direct Examination

Mr. Mathewson: Q. Where do you live, Mr. Rodoni? A. Soledad.

Q. What do you do? A. Milker on dairy.

Q. You entered a plea to a charge of violating the Internal Revenue Law by the operation of a dis-

(Testimony of Angelo Rodoni.)

tillery on the Frank Dougherty place, did you not?

A. I did.

Q. And you were sentenced? A. Yes.

Q. What was the sentence?

A. 90 days in the County Jail and $200 fine.

The Court: Q. You are the one that was working there?

A. Yes, I working, your Honor.

Mr. Mathewson: Q. Do you remember when you first went on the Dougherty place?

A. I don't remember exactly.

Q. As near as you can remember?

A. It was about in October, I think, 1934.

Q. Did you go on the Dougherty place alone or with others?

A. With Bianchini and Biagi.

Q. About what time of the day did you go there?

A. Oh, if I recall, it was before noon.

Q. Did you see Mr. Dougherty then?

A. Yes, we went up on the road and he was there in the corral by the house; I don't recall exactly the place where he was.

Q. Did the three of you drive in the place and have a conversation with Mr. Dougherty?

A. We stopped the car and we got off of the car and we went up and talked to him.

Q. Do you remember the conversation you had with Mr. Dougherty? A. Yes.

Q. Will you relate it to the judge?

(Testimony of Angelo Rodoni.)

A. Well, these two guys, Bianchini and Biagi, they didn't know Frank Dougherty. Of course, I didn't know him very well, but I know him, seeing him on the street [138] and so on, so I told him that these two fellows are interested in renting a piece of land from him for some purpose or another. So I told him, "These are the two guys; you can have a talk with them.

Q. Mr. Dougherty then had a conversation with Mr. Biagi and Mr. Bianchini? A. Yes.

Q. Were you present at the time of that conversation? A. Yes.

Q. What was the conversation?

A. Well, they told him they would like to rent the barn to make a little whiskey, as they was going to make a little arrangement so it would be leased for cattle. It shows on the lease it would be rented for the purpose of raising cattle and stuff like that.

Q. Did you have any conversation as to the amount of rental?

A. Well, I heard Biagi and Bianchini tell him that they was going to pay him between $125 or more a month.

Q. Do you know the rental that was to be paid? You said $125 or more a month. A. Yes.

Q. Do you know whether that rental was to fluctuate with the money they received from the still?

Mr. O'Connor: That is objected to upon the ground that it is incompetent, irrelevant, and immaterial.

(Testimony of Angelo Rodoni.)

The Court: State the conversation—not what he knew.

Mr. Mathewson: Q. Did you subsequently sign a lease? A. Yes.

Q. I show you Plaintiff's Exhibit 1 in evidence and ask you if that is the lease that you signed?

A. Yes.

Q. How did you sign it? What name did you use in signing it? A. Coranti Perolli.

Q. Did you sign that name, "Coranti Perolli"?

A. Yes.

Q. Where did you sign that name?

A. The house on the ranch.

Q. Do you know where this lease was prepared?

A. Bianchini told me it was prepared in San Juan. [139]

Mr. O'Connor: I move that that go out as hearsay and not binding upon the plaintiff.

The Court: It will go out.

Mr. Mathewson: Q. You signed that lease on the ranch. Who gave it to you?

A. I don't recall if it was Biagi or Bianchini, but it was one of the two. They told me to bring it over to Frank and sign it.

Q. After the lease was signed, did you work around the place?

A. I worked for a few days helping the guys.

Q. What did you help them with?

A. Well, moving and fixing pipes, and whatever was necessary to put up this equipment.

(Testimony of Angelo Rodoni.)

Q. Did you help them in moving the equipment in? A. Yes.

Q. Did anybody besides Biagi and Bianchini help you with the equipment? A. Yes.

Q. Who else?

A. I think Brunza Quinto.

Q. Brunza Quinto, Biagi, and Bianchini, and yourself unloaded the equipment? A. Yes.

Q. Anybody else? A. No.

Q. Did you work in the still after it was set up?

A. No.

Q. Did you work there in the spring of 1935?

A. Yes.

Q. What did you do then?

A. Truck driver.

Q. What were you hauling?

A. I was hauling molasses and sugar—supplies to run the still.

Q. Do you know how many trips you made?

A. Oh, between 12 or 15 trips, I guess.

Q. Do you recall what time of the day it was that you would make the trips?

A. I used to go down there at the ranch about eight or nine o'clock at night.

Q. Would you leave again the same night?

A. Well, usually it was about the same time every night. [140]

Q. You would arrive there about eight or nine o'clock at night? A. Yes.

(Testimony of Angelo Rodoni.)

Q. What road did you use in driving into the place?

A. Sometimes I used to go by the River Road to Monterey; sometimes I used to go out to Chular and take the old County Road and go up to the ranch.

Q. In driving in to the Dougherty ranch which road did you use in going from the River Road in to the still?

A. You mean the road that goes into the ranch?

Q. Yes.

A. There was only one road that goes into the ranch to the place where the still was.

Q. That was the only road you used?

A. Yes.

Q. That was through the gate in the fence, the south gate towards Chular? A. Yes.

Q. Did you ever pay any money to Mr. Dougherty?

A. Well, one time I was up there Biagi and Bianchini they gave me $125 and said "You bring it over to Frank."

Q. Did you? A. Yes, I did.

Q. Do you recall about when that happened?

A. I don't remember the date.

Mr. Mathewson: That is all.

Cross Examination

Mr. O'Connor: Q. Now, when you first talked to Mr. Dougherty, you and Bianchini and Biagi,

(Testimony of Angelo Rodoni.)

tell us what the conversation was, as you recall it.

A. Well, that is what I told just now.

Q. Well, tell us again.

A. We was out there and we drove by and I saw Frank around the yard or the corral, I don't remember exactly the place where I saw him. We stopped and we got off, and I told Frank, I says, "Here is two men, Biagi and Bianchini, that is the name, and they are interested in renting a piece of land from you for raising cattle or some other purpose." And I guess then [141] they went along with Frank Dougherty and had a talk with him.

Q. Were you present when they talked to Dougherty? A. Yes.

Q. What did they say?

A. They say that they were going to rent the barn to make some whiskey.

Q. To make some whiskey? A. Yes.

Q. They used the word "whiskey"? Did they use the word "whiskey"? A. Yes.

Q. Is that all? A. That is all.

Q. That is all that was said at that time?

A. Yes.

Q. Did they say anything about a still?

A. That is to make whiskey.

Q. Did they mention the word "still"?

A. They expect to put up a still to make whiskey.

Q. They expect to put up a still to make whiskey? A. Yes.

(Testimony of Angelo Rodoni.)

Q. They also said they wanted to run cattle and raise chickens, is that right?

A. They said, "You could make a lease that shows that the ranch is rented to raise cattle."

Q. All right; the question of raising cattle was mentioned, wasn't it? A. It was.

Q. Now, when did you sign that lease, Mr. Rodoni?

A. I don't recall the date when I signed the lease.

Q. You don't recall the date?

A. I don't remember.

Q. Do you remember testifying at the last trial of this case? A. Yes.

Q. Do you remember at the last trial that you were put on the witness stand, you were examined by the United States Attorney, you were cross examined by me, and that you then left the stand as a witness, and up to that time you hadn't testified that there was any conversation with Dougherty about running the still, there; but that after consulting with your attorney, Mr. Molloy, and after having talked to Mr. Mathewson, of the United States Attorney's Office, you came [142] back the next day and testified that you did have a conversation with Dougherty about using the barn for a still? Do you remember that?

A. I remember that, but what I said when they first asked me what was the conversation, I told them just the way I say it now.

(Testimony of Angelo Rodoni.)

Q. You didn't tell them anything about a still when they first asked you? A. I did.

Q. The first time you testified? A. Yes.

Q. You told them that the first time you testified? A. Yes, sir.

Q. I would ask you to read your testimony taken on January 29, 1936, beginning on page 2, January 29, 1936, at two p. m., and continuing to page 18, and ask you if you can show me anywhere in there where you mentioned anything in there about a still?

The Court: Ask the attorney.

Mr. O'Connor: Will you stipulate?

Mr. Mathewson: If the Court please, the question, itself, is argumentative, but so far as I see it there is nothing in the report referred to, there is no direct statement with reference to the operation of a still.

Mr. O'Connor: There is no statement in there that he had a conversation with Dougherty in which he said or the other men said that they wanted to use this barn for a still or to make whiskey?

Mr. Licking: I will further stipulate that he was never asked the question, if the Court please. I will stipulate that the answer isn't in there.

Mr. O'Connor: That he did not so testify?

Mr. Licking: He never was asked that question.

Mr. O'Connor: Q. And isn't it a fact that you came back the next day and said that after talking to your attorney, Mr. Molloy, the night before, that

(Testimony of Angelo Rodoni.)

you were determined to come back and tell the [143] truth; isn't that correct? A. Yes.

Q. And then on the next day for the first time you testified to this conversation with Dougherty about their using that place to make whiskey; isn't that true?

A. I don't quite understand that question.

Q. All right; it is immaterial; isn't it true that at the last trial you testified that there was no conversation with Dougherty concerning using the land to run cattle on? A. No.

Q. Did you so testify at the last trial?

A. Yes.

Q. You did? A. Yes.

Q. Are you sure? A. Yes.

Mr. O'Connor: Will you stipulate that he did not, Mr. Licking?

Mr. Licking: I can't stipulate.

The Court: I am an innocent bystander here, but was he asked if there was any cattle?

Mr. O'Connor: Yes, I will call his attention to the cattle.

The Court: Call it to his attention.

Mr. Licking: If it is your intention to impeach the witness by the use of the transcript, I would suggest before asking the question about his testimony that you show him the transcript. I would suggest otherwise that you are bound by his answer.

The Court: It may be helpful to me: Do you know of any reason why I gave him a fine of $200?

(Testimony of Angelo Rodoni.)

Mr. O'Connor: Because he testified for the Government.

The Court: Was that your state of mind?

Mr. O'Connor: I think that it was represented to your Honor that he was entitled to consideration because he testified for the Government.

The Court: Yes.

Mr. Licking: I suggest, your Honor——

Mr. O'Connor: And he was an employee also.

[144]

The Court: I have a peculiar state of mind on it. Now and then I check on myself, and I have a fair memory, although at times it fails me. But if I remember, that is the reason I sentenced the other two defendants to longer sentences, and this man got 90 days or $200.

Mr. O'Connor: He was an employee; he wasn't an owner; and he also testified for the Government, and I think it was represented to your Honor at the time that he had testified as a witness for the Government. I assume he was entitled to consideration from that fact.

Mr. Licking: If I may refresh your Honor's recollection and possibly dispell the idea that counsel has, that your Honor's sentence was based on any idea that any consideration be given to him for such service as he rendered, the defendant Quinto was given a penalty of $500 or 90 days, and the defendant Brunzo was given a $500 fine or 30 days. This witness was fined $200 and 90 days.

(Testimony of Angelo Rodoni.)

Mr. O'Connor: Of course, this witness was in a little different position than some of the other defendants. While he was an employee he testified at the last trial that he was the man that purchased the still from some cousin of his and sold the still to the other two defendants.

The Court: It is beside the issues here. I also sit in judgment on myself in relation to this work. The only reason I am inquiring, it might be helpful to me later on in doing the things I am expected to do.

Mr. O'Connor: Page 24 of the transcript.

Mr. Licking: Just a minute. What line?

Mr. O'Connor: My transcript is not numbered by line. It would be about the sixth line. I will show him the testimony.

The Court: Can you read? A. Yes.

Mr. Licking: If the Court please, if I may suggest that at [145] some time the Court read this testimony from page 24, beginning with the wording indicated, if I may offer it to the Court to read it at the time.

The Court: Proceed.

Mr. O'Connor: Q. Start reading, Mr. Rodoni, with that line and read down to the end of the page.

A. Each say——

Q. Read it to yourself. I ask you if at the last trial, Mr. Rodoni, in answer to the following questions you gave the following answers:

(Testimony of Angelo Rodoni.)

Mr. Licking: If the Court please, before reading the questions and answers, the Court having already read it, I would suggest that the evidence can be read for only one purpose, of impeachment of the witness.

Mr. O'Connor: He has already testified——

Mr. Licking: If that is the purpose——

Mr. O'Connor: That is the purpose.

Mr. Licking: And the purpose, I take it, is to impeach an answer he has given to a question which you have asked him?

Mr. O'Connor: That is correct.

Mr. Licking: May I have that question read? May I have the question of counsel read?

(The reporter here read from the previous record.)

Mr. Licking: If the Court please, I submit that the matter is in no way impeaching.

The Court: The transcript discloses that he did at the other trial state in relation to the lease "They said they were going to make a lease to show that it was for some other purpose." Did they say anything about dry cows?

Mr. O'Connor: Yes, but he didn't.

The Court: They said to make whiskey.

Mr. O'Connor: There was no testimony in the transcript that [146] there was any mention about dry cows. He said today there was.

The Court: Yes, on page 24, the seventh line from the bottom.

(Testimony of Angelo Rodoni.)

Mr. O'Connor: Where is any statement by him about dry cows? All he says, "They were going to make the lease to show that it was for some other purpose."

Mr. Licking: That is all.

Mr. O'Connor: They don't say anything about dry cows.

The Court: He was asked the question, "Did they say anything about dry cows?" The answer is "They said they were going to make the lease and make it to show it was for some other purpose."

Mr. O'Connor: That is in answer to the question. I asked him that at the last trial.

The Court: Ask him now. I think you will save time anyway.

Mr. O'Connor: He has testified now already that he did say at the last trial—I think it is immaterial, anyway, so I will withdraw it.

Q. Mr. Rodoni, there has been a tax assessed against you as the result of the operation of this still; isn't that correct? A. Yes.

Q. How much is the amount of that tax?

A. I don't recall the amount.

Q. It is in excess of $7000, isn't it?

A. I guess it is about that much.

Q. And you consulted an attorney concerning it, haven't you? A. Yes.

Q. Mr. McShane? A. Yes, sir.

Q. And you have been advised, have you not, that some of the taxes have already been collected from Mr. Dougherty, haven't you? A. Yes.

(Testimony of Angelo Rodoni.)

Q. You knew that that would deduct from the amount of tax that you would have to pay?

A. Yes, sir.

Mr. O'Connor: That is all. [147]

Mr. Mathewson: No questions.

That is the Defendant's case, your Honor.

The Court: Is the matter submitted?

Mr. O'Connor: No, your Honor, I have some rebuttal testimony. I haven't it available at this time. Tomorrow morning.

The Court: Very well; we will take the adjournment until tomorrow morning.

(Thereupon an adjournment was taken until Wednesday, June 14, 1939, at ten o'clock a. m.)

[148]

Wednesday, June 14, 1939.

FRANK A. DOUGHERTY,

the Plaintiff, being recalled as a witness in his own behalf in rebuttal, testified as follows:

Mr. O'Connor: Q. Mr. Dougherty, approximately how much of the 20 acres that we have been discussing here is hay land?

A. I should judge ten acres.

Q. In a normal year or in a fair year how much hay will that land produce to the acre?

A. About two tons and a half.

(Testimony of Frank A. Dougherty.)

Q. In a fair year what is the normal sale value of that hay on the ground?

A. About $12—$12.50.

Q. That is loose hay on the ground?

A. Loose hay.

Q. What would be the price of it baled?

A. Baled we sold hay for $17.

Q. That would be from the barn?

A. From the barn.

Q. What does it cost you to bale hay?

A. About two and a half a ton.

Q. How much would you say it would cost you or cost the ordinary person operating under ordinary circumstances to put in that ten acres in hay and harvest it?

A. It would cost in the neighborhood of $50.

Q. In the neighborhood of $50? A. Yes.

Q. When you leased this land to those people that have testified here, did you put any limit on them as to what they could use the land for?

A. No, sir.

Q. You didn't tell them what they could or could not use it for? A. No.

Q. As far as you were concerned, they could have used it for any purpose they saw fit?

A. Any purpose.

Q. Did you at any time agree to receive from them a rental of $125 [149] a month?

A. No, sir.

(Testimony of Frank A. Dougherty.)

Q. Did you ever receive a rental of $125 a month? A. No, sir.

Q. Did you receive three payments of $125 a month from these people? A. No.

Q. Is it the fact that the only rent you received was the money that you have testified to, a hundred dollars on two different occasions?

A. Yes, sir.

Q. Now, then, you heard these men testify yesterday that when they talked to you they told you that they were going to use this barn for the purpose of an illicit still. Did they ever mention "still" to you? A. No, sir.

Q. Any of them? A. No, sir.

Q. The question of the still or the use of the premises for the making of whiskey was never mentioned to you at any time? A. No, sir.

Mr. O'Connor: You may cross examine.

Cross Examination

Mr. Licking: Q. You say you never put any limit on their use of the property? A. No, sir.

Q. Calling your attention to Plaintiff's Exhibit No. 1 and particularly to the covenant and agreement upon the third page, I ask you to read that typewritten portion there.

A. That part I did.

Q. You did put—— A. Yes, sir.

Q. —this provision: "and it is further agreed that said leased property will not be used in any

(Testimony of Frank A. Dougherty.)

manner or form so as to conflict with any Federal or State laws or any county ordinances. Violation of which will cancel this lease and the lessor will immediately remove all persons therefrom." Why did you put that in the lease?

A. Well, they do it in all leases.

Q. Why did you put it in this lease?

A. Well, supposed to [150] be the proper thing to do.

Q. Did you regard it as the proper thing to do?

A. Yes, sir.

Q. You have heard these people testify that they moved the still into this place which is, by the way, how far from your house?

A. Well, from where I stay it is about 250 feet.

Q. About 250 feet. Don't you ever get around your house, around to the back of the house in the course of a year or closer——

A. Very seldom, you know, I happen to walk around that way.

Q. You get around that way; it is a little closer; isn't that so? A. No, it is further.

Q. About 250 feet? A. Yes, sir.

Q. Is the closest place to it. You have heard these people testify that they moved the still in there; that they operated that still 21 or 22 days; that they removed it; that they dumped the disabled boiler into the arroyo off from the place; that they used the cabin on your place for some of their employees to sleep; that they discontinued operations

(Testimony of Frank A. Dougherty.)

there for a considerable time; that they afterwards reinstalled the still, put in a new boiler, and operated it again. Did you see any of those things going on? A. No, sir.

Q. Did you ever look there to see what they were doing? A. No, sir.

Q. Well, then, again, why did you put that particular clause in the lease?

Mr. O'Connor: I submit the question has been asked and answered, if your Honor please; repetition of the former cross examination; nothing was asked on direct concerning this matter.

The Court: Overruled.

Mr. O'Connor: Go ahead and answer.

A. Why did I?

Mr. Licking: Yes.

A. That is why all people do mostly in leases.

[151]

Q. But you said you considered this a proper thing to have in the lease. A. Yes, sir.

Q. You considered it a part of your duty to see that your property was not used to violate the law?

A. Yes.

Q. That is why you put it in there, wasn't it?

A. Yes, sir.

Q. Then why didn't you do it? Why didn't you ever look?

Mr. O'Connor: I object to that on the ground that it is argumentative, if the Court please.

The Court: Objection sustained.

(Testimony of Frank A. Dougherty.)

Mr. Licking: Q. What was actually done with this hay on that particular piece of hay ground the year the still was seized?

A. That hay laid there.

Q. That hay laid there? A. Yes, sir.

Q. It was cut, wasn't it?

A. Yes, sir, it was cut.

Q. Who cut it? A. I cut it.

Q. How close did that take you to the still premises?

A. Well, I guess about a hundred yards.

Q. About a hundred yards. I understand from your lease that this property, this 20 acres, with this hay land on it, was leased to these gentlemen who operated the still; that is correct, isn't it?

A. I didn't hear you.

Q. Wasn't this hay land leased, as the lease recites, to the people who operated that still?

A. Yes, sir, but there is a corral there quite a ways away from the barn.

Q. How did you happen to cut the hay?

A. He spoke to me to do it when he got the place.

Q. He said he wanted you to cut the hay?

A. Yes, sir.

Q. For yourself? A. No, sir.

Q. Just wanted it cut to lay on the ground?

A. I cut it and piled it; that was the last I heard of it. I just pulled it together with [152] the rake.

(Testimony of Frank A. Dougherty.)

Q. Did he pay you for cutting it and piling it?

A. No, sir.

Q. What? A. No, sir.

Q. When did you cut it? How long before the seizure? A. What?

Q. How long before the seizure of the still, there, did you cut it?

A. It was cut about the latter part of May and the first of June.

Q. When was the seizure?

A. Just before that was knocked over.

Mr. O'Connor: June 3rd.

Mr. Licking: Q. June 3rd. You usually cut that hay in the latter part of May, don't you?

A. Yes, sir.

Q. Wasn't that just the normal harvesting operation that was going on, and didn't you really intend to use that hay, yourself?

A. That hay I cut, myself?

Q. Didn't you intend to use it?

A. No, sir, that is their hay.

Q. What did they pay you for cutting it?

A. They didn't pay me anything. I spent about $50 putting it in and cutting it for them.

Q. You spent about $50 putting it in and cutting it? A. Yes, sir.

Q. And you did cut it as a favor to them?

A. Sir?

Q. You just cut it as a favor to them?

A. That is all.

(Testimony of Frank A. Dougherty.)

Q. What does it cost you to cut hay on that land?

A. Well, I think they cut hay this year for a dollar and a quarter an acre—cut and bunch it for a dollar and a quarter an acre.

Q. Then you just as a favor to them cut and bunched the hay? A. That is right.

Q. As a matter of fact, wasn't it definitely understood from the first that they weren't interested in the ground at all, all they wanted was the use of the barn? A. No, sir.

Q. That wasn't? A. No, sir.

Q. You are quite sure you never noticed any activity on their part at all? A. No, sir. [153]

Q. On these leased premises. You are equally certain you never went over there to look?

A. Never had no occasion to.

Q. Never had any occasion to look?

A. No, sir.

Q. Again, so I will be sure about that, did you believe that that clause in the lease prohibiting an illegal use of your property was an improper clause?

Mr. O'Connor: Just a moment. Objected to upon the ground it has been asked and answered three times.

The Court: He may answer.

A. I think it was right.

Mr. Licking: Q. Do you believe that your own actions in never looking at the property to enforce that were right?

(Testimony of Frank A. Dougherty.)

Mr. O'Connor: Just a moment. Objected to upon the ground that it is argumentative; what he believed whether it was right or wrong is immaterial.

The Court: Well, the fact is that he didn't. Let the record stand.

Mr. Licking: No further questions.

Mr. O'Connor: That is all, Mr. Dougherty.

KASPER E. CADLE,

called as a witness on behalf of the plaintiff in rebuttal; sworn.

The Clerk: Please state your full name to the Court. A. Kasper E. Cadle.

Direct Examination

Mr. O'Connor: Q. Mr. Cadle, where do you reside? A. Salinas.

Q. How long have you lived there?

A. 10 years.

Q. What is your occupation?

A. Real estate business.

Q. How long have you been in the real estate business? A. About a year and a half. [154]

Q. Prior to being in the real estate business what was your occupation?

A. I managed the H. P. Garin Company's holdings down in that country, farming——

(Testimony of Kasper E. Cadle.)

Q. You managed the H. P. Garin Company, who are growers and farmers in that area?

A. Yes, sir.

Q. They were one of the largest farmers and growers down there; is that correct?

A. Yes, sir.

Q. Do you know where the Dougherty ranch is —the so-called Dougherty ranch? A. Yes, sir.

Q. Do you know where the Dougherty house is?

A. Yes, sir.

Q. Are you familiar with the 20 acres of land southwest of the Dougherty house and fronting on what is known as the River Road?

A. Yes, sir.

Q. Now, then, Mr. Cadle, you know, do you not, that there is a barn on there that will accommodate 16 horses?

A. I know there is a very large barn; I have seen it; I never paid much attention as to how many it will accommodate.

Q. You are familiar, I assume, with the value of lands and rental values in that particular area down there, are you?

A. Yes, sir; we had a ranch right below it, H. P. Garin, that I leased while I was with them, just down the road a little ways.

Q. Now, then, what would you say would be a fair rental value for the twenty acres of land I have described, including the use of barns and water supply, if that ranch was to be used for instance

(Testimony of Kasper E. Cadle.)

for the running of cattle, or chickens, and for the hay that was on the land? What would you say would be a fair rental per acre per year?

A. Oh, $18 to $20 an acre.

Q. Would you say that $20 an acre would be an excessive rent? A. No.

Mr. O'Connor: You may cross examine. [155]

Cross Examination

Mr. Licking: Q. Would you say that $125 a month would be an excessive rent?

A. For the——

Q. For that piece of land.

A. $125 a month, yes, it would be a good rent.

Q. I didn't ask you whether it would be a good rent or not. I said, would you say that would be an excessive rent, out of line and proportion to the value of the property for the purposes mentioned or for any legitimate purpose?

A. $125 a month for the entire——

Q. Yes, would that be out of line?

A. That would be out of line.

Q. That would be out of line for any legitimate purpose? A. Yes.

Mr. Licking: That is all.

Mr. O'Connor: That is all.

ANGELO V. RAINDA, JR.,

called for the Plaintiff in Rebuttal; sworn.

The Clerk: Please state your full name to the Court. A. Angelo V. Rainda, Jr.

Direct Examination

Mr. O'Connor: Q. Mr. Rainda, where do you reside? A. In Salinas.

Q. What is your business or occupation?

A. Real estate.

Q. How long have you been in that business?

A. About fifteen years.

Q. Do you deal in farm lands in the area in the Salinas Valley?

A. Practically exclusively in real estate.

Q. And that includes farm lands in that area?

A. Farm lands in that area.

Q. Do you know where the Frank Dougherty place is? A. Yes.

Q. Do you own a place of your own nearby there? A. Just a short ways from it, yes.

Q. Directing your attention to the 20 acres of land southwest of the [156] Frank Dougherty residence and fronting on the road known as the River Road, are you familiar with that 20 acres?

A. Yes.

Q. Are you familiar with land values and rentals in that particular area?

A. I believe I am, sir, yes.

Q. What would you say would be a fair rental value for the 20 acres of land I have described, in-

(Testimony of Kasper E. Cadle.)

cluding the barn that is situated thereon, the water supply, the hay field, grazing land, if the property were to be used for the purpose of raising chickens and running cattle? What would you say would be a fair rental value for that land?

A. For raising chickens?

Q. And running cows.

A. Or running cattle, dairy stock?

Q. Dry stock. A. Dry beef stock?

Q. All I can describe it is dry stock, and the value of the hay land.

A. The reason why—may I explain why I ask that?

Q. Yes; go ahead.

A. The property, itself, has several valuations due to its locality, the vicinity near Salinas, and there are several ways of establishing valuation on that property, and if a man wanted to use it for any one of several things he could pay several different rentals.

Q. Yes.

A. So for a chicken ranch, perhaps $500, $600 a year would not be too exorbitant.

Q. Would you say that $400 a year would be a fair rental for that property?

A. I would say it would be a very fair rental.

Q. It wouldn't be too much?

A. No, it wouldn't be too much.

Q. The land is adaptable for other purposes, too, isn't it?

(Testimony of Kasper E. Cadle.)

A. The value of the property is in the fact that it has buildings, has improvements, and that is where the largest valuation of that property rests, because the demand in my business has been for the past—and at least since the time that the lettuce industry has been in Salinas, the canned vegetable industry, it has always been that [157] there has been a great demand for property anywhere close to Salinas of that type, five, ten, twenty, thirty acres, with buildings of some type on them, especially with water where they could bring their lettuce culls to, or truck them to, or carrot culls, or bean screenings, or grain screenings—grain gleanings. All those added to the value, especially the closer to Salinas the better it was for them, or closer to the source where these culls were taken. So I would—I have ten acres on my own place with barn and water, and I have turned down $500 a year rental just within the last week.

Mr. O'Connor: You may cross-examine.

Cross Examination

Mr. Licking: Q. How about the chickens? What use would this hay land have for the chicken industry?

A. It would have this use: they could put—they would put perhaps their chicken coops and chicken houses there and there would be yards to run the chickens, and they could run on even less than that several thousand chickens.

(Testimony of Kasper E. Cadle.)

Q. Yes, but what I had in mind, they could probably run a great many chickens on 20 acres; in other words, the only value of the land as far as the running of chickens is concerned is, I suppose, for coops and pens? A. And yards.

Q. There is no feed for chickens on the land?

A. There could be. He could have ten acres——

Q. There isn't; I didn't ask what there could be.

A. There is, yes.

Q. What feed is there? Do they eat grass, like cows? A. What do you mean?

Q. I mean cows eat grass, but I haven't observed chickens do it down there, have you?

A. Chickens eating grass?

Q. Yes.

A. I don't know whether they do. [158]

Q. You don't know very much about the chicken business?

A. I think I do know something about it.

Q. You don't know whether they eat grass or not? A. Would that be——

Q. What I am getting at is this: there isn't anything on that land as I listened to the testimony here, there didn't seem to be anything on it except grass and some hay.

A. Perhaps that hay land could be put into barley or wheat, which it would be—it would be barley hay, or wheat hay, or alfalfa hay, or some type of hay.

(Testimony of Kasper E. Cadle.)

Q. Do you think that piece of land is susceptible of cultivation for those crops?

A. I think it would be for barley and wheat, yes.

Q. How about the barn, as far as the chicken business is concerned? How would he use this horse barn? A. For chicken business?

Q. Yes. A. Well, that I don't know, sir.

Q. Can you think up any conceivable set of circumstances where $100 a month would not be—that is, for any legitimate purpose, would not be an excessive rental? A. $125 a month?

Q. Yes.

A. Oh, I suppose if somebody wanted a riding academy on it—they are very horse-minded around Salinas. There are a considerable number of horses and people quite crazy about horses. There is a couple of academies there now. I suppose it would pay.

Q. You suppose $125 a month—do you expect the Court to believe you that $125——

A. I wouldn't have said it, sir, if I didn't.

Q. $125 a month. That is how much a year?

A. Perhaps $1500.

Q. $1500 a year. What does the land sell for, land of that type, ten acres of hayland and five acres of rolling pasture land with oak trees and what-not on it? What does it sell for?

A. It is a rather indefinite way to figure it. It

(Testimony of Kasper E. Cadle.)

would depend on demand what a man would pay for it. [159]

Q. What does the land sell for without improvements? I am just getting at——

A. There is cases I can recite where it has gone for as high as $150 to $200 an acre.

Q. What is the average?

A. Say $75 to $80 an acre, without the improvements.

Q. $75 to $80 an acre without the improvements. Then, putting your top price on all of it, putting this pasture land in—you don't mean the pasture land sells for that?

A. Everything that is there, the oaks—there is some level land there on the lower end of the pasture land.

Q. There is ten acres of level land——

Mr. O'Connor: Let him finish his answer.

Mr. Licking: Q. Would $80 be the top price for it?

A. I wouldn't want to say what the top price would be, because demand would make the price, and I don't *know great* the demand would be.

Q. In other words, if somebody wanted the land for some particular purpose and was willing to pay more than it was worth, why, he would take it?

A. Yes.

Q. Surely, but what I am trying to get from you as an expert is what is the going price for land of that type in the Salinas area. There is, as you

(Testimony of Kasper E. Cadle.)

know, I assume, as an expert, a going price usually for lands of a certain type in a certain district. I just wanted to get an idea what that was.

A. Well, I could cite a rental right this side of it. That is the only way you can definitely set your value what it is worth.

Q. I am speaking of the sales price; I am speaking what the land is worth an acre.

A. Oh, I see.

Q. You just said from $70 to $80 an acre.

A. Rental.

Q. Not rental.

A. You had me confused; I didn't understand you. I thought you said what it would rent for.

[160]

Q. I didn't ask you what it would rent for. I asked you what land like that sells for.

A. Oh, $70, to $80 an acre without improvements.

Q. Take your top price——

Mr. O'Connor: Let him finish his answer.

Mr. Licking: Q. You said $70 to $80 an acre?

A. Without any improvements.

Q. We will take the land, then, at your top price, the whole thing at $80; that is $1600 for the whole piece of land, that is, to buy the land.

A. Yes, sir.

Q. What did it cost to put up the barn?

A. Maybe $1500; maybe a little more.

(Testimony of Kasper E. Cadle.)

Q. That is $1500 and $1600; that is $3100 that you could buy it for and you expect the Court to believe that a fair rental for that would be $1500 a year?

Mr. O'Connor: He didn't say that.

A. I didn't say that that would be a fair rental. I just cited—you asked me what it would be.

Mr. Licking: Q. I asked you if there was any conceivable set of circumstances where $125 a month would be a reasonable rental for it and you said there was if somebody wanted it for a riding academy.

A. Yes, sir, that is correct; there is nothing exorbitant in that.

Q. Well, in view of the analysis of your own statement that it isn't worth over $3100 to buy it outright, do you expect the Court to believe that $1500 a year would under any circumstances be a reasonable rental?

Mr. O'Connor: Just a moment. I object to that on the ground that it is incompetent, irrelevant, and immaterial, what he wishes the Court to believe. That is immaterial. [161]

The Court: State the fact.

Mr. Licking: Is that a fact, that a piece of land worth, according to your own figures, $3100, is reasonably under any circumstances— —

Mr. O'Connor: Just a moment.

Mr. Licking: Let me finish my question before

(Testimony of Kasper E. Cadle.)

you start your objection, if you don't mind. Will you read my question?

(The reporter read the question, as far as framed.)

Mr. Licking: Q. —is reasonably, under any circumstances, worth $1500 a year for rent?

The Court: Answer that question.

A. Why, well, it wouldn't necessarily be reasonably so, but it could be so. They do pay a very stiff rental, yes; I am not very versed in riding academies.

Q. Then what are you testifying about it for if you were not versed in it? A. What is that?

Q. Then what are you testifying about it for if you are not versed in it?

A. Well, the first question you asked me whether it was conceivable, whether any conceivable——

Q. I didn't ask you if it was conceivable; I said if under any conceivable legitimate use that was a reasonable rental. Again, if you can answer my question, do you think that under any conceivable, legitimate use, a piece of land worth only $3100 with improvements is worth $1500 a year in rental value?

A. I didn't say that it was worth $3100, because you only quoted the land and the buildings. There is water on the place, and fences, and corrals, and those all have to be taken into consideration, and perhaps the place is worth a good deal more than that.

(Testimony of Kasper E. Cadle.)

Q. What kind of water is there on the place, spring or pump? A. I think there is a pump.

Q. There is a well and pump?

A. Well and pump. [162]

Q. You can pump water any place in the valley, can't you?

A. Certainly you can. Not any place in the valley; I have hit some dry wells in the valley.

Q. At that level over there?

A. At that level.

Q. At that level through there do you hit dry wells? A. At a much deeper level than that.

Mr. Licking: I think that is all.

Mr. O'Connor: That is all, Mr. Rainda.

Mr. Licking: Q. Just a minute. Did you ever look at this piece of land, yourself, ever go on it?

A. Yes, I have been on it, sir.

Q. You have been on it. You say you think there is a well on it. As a matter of fact, isn't it true that there is no well at all, and that the well is on the adjoining property?

A. I don't know just what the boundary is. I can't say what the 20 acres should have over this way or the other way. I know the boundary on the other side, because there is a fence.

Q. I thought you said there was a fence.

A. There is a fence around the front and around the other side, and around the upper end, the corrals.

Q. Where is the well?

(Testimony of Kasper E. Cadle.)

A. I presumed that that well which appears to be right in there was on the place, too.

Q. You don't know whether the well is on the place, or not?

A. I don't definitely know, no.

Mr. Licking: I see. That is all.

JAMES H. RILEY,

Called for the Plaintiff in Rebuttal; Sworn.

The Clerk: Please state your full name to the Court. A. James H. Riley. [163]

Direct Examination

Mr. O'Connor: Q. Mr. Riley, where do you reside? A. In Salinas.

Q. How long have you lived there?

A. All my lifetime.

Q. What is your business or occupation?

A. Well, farming and cattle raising.

Q. How long have you been in that business?

A. Oh, ever since—did nothing else.

Q. You have done that all your life?

A. Yes.

Mr. Licking: We will admit this witness' qualifications.

Mr. O'Connor: Q. Do you know the 20 acres surrounding the Dougherty house on the River Road? Are you familiar with that 20 acres of land?

A. I am familiar with the place very well.

(Testimony of James H. Riley.)

Q. Do you know where the Dougherty home is?

A. Yes.

Q. Do you know where the barn and corrals are to the south of it? A. Yes.

Q. Do you know the hayfield and the 20 acres south of that fronting on the River Road?

A. Yes.

Q. How much would you say would be the reasonable value or would be a reasonable rental for that 20 acres, including the barns, corrals, outhouses, water supply, hayfield, grazing field? How much would you say would be a reasonable rental for that land?

A. Well, it all depends on what you use it for. For instance, you might—some chap might come along that would pay all kinds of rent for it. A place like that would be hard to get. You can't pick them up.

Q. Would you say for any purpose that $20 an acre a year would be an excessive rent?

A. No, no.

Mr. O'Connor: You may cross-examine.

Cross Examination

Mr. Licking: Q. You mean it is worth $20 an acre to run stock [164] on, that you as a stock man would pay $20 an acre for that to run stock on?

A. You wouldn't really run stock on that.

Q. On the ten acres that is hay land. There is ten acres of this hay land.

(Testimony of James H. Riley.)

A. That has always been in hay.

Q. Ten acres.

A. I don't know exactly; I know the strip in there.

Q. There seems to be a concensus of opinion that the hay land—Mr. Dougherty, himself, says the hay land is ten acres, so we can take that as a fact. You have rented hay land there?

A. What is that?

Q. You have rented such hay land for hay and sold it during the time you have been there?

A. Yes.

Q. What terms do you usually get hay land on? We will say first when you are a purchaser, when you want to pick up the hay.

A. When you buy hay?

Q. Yes.

A. Oh, it all depends on the season. Sometimes you can pick up hay for $7; sometimes you have got to pay $15 for it.

Q. Ordinarily, when there is a good crop of hay, the price is low? A. Yes.

Q. When there is a poor crop of hay the price is higher?

A. It all depends. That all depends. It all depends on the demand and supply.

Q. What do you figure your own hay land is worth, hay land like that ten acres?

A. Oh, that hay land, I have seen three ton of

(Testimony of James H. Riley.)

hay on that piece. I don't think it is quite that much this year; it ain't quite as heavy.

Q. I am just asking you, what do you figure that hay land is worth?

A. What the land is worth?

Q. Yes. A. Just that piece?

Q. Yes. What is hay land in that country generally worth?

A. You are talking about the sale of your land? [165]

Q. Yes.

A. You couldn't buy that land for $200 an acre.

Q. You couldn't buy it?

A. No, you couldn't. It would go for a residential district. That is one of the most beautiful places in the valley right there.

Q. You are speaking of subdividing it for real estate purposes?

A. No, that would be—if you are asking me the value, I don't think it could be bought for that price.

Q. Is land scarce in the Salinas Valley?

A. It is hard to get hold of a little piece like that.

The Court: Q. How many thousand acres do you own?

A. Well, I don't—I just sold a piece, 1800.

Q. 1800? A. Yes.

Q. How long did you have that piece?

A. I have had it since 1912.

(Testimony of James H. Riley.)

Q. What did you pay for it?

A. I paid I think it was $7 an acre.

Q. $7 an acre. And you sold it for how much?

A. I got $12.50 an acre for it. It is rough country; it is in the rough.

Q. No hay land in it, at all?

A. Oh, yes, there is hay land. It is rough country to get into.

Q. About how many acres of hay land did you have?

A. Oh, I guess there is about 40 or 50 acres could be put into hay.

Q. What is the most you ever got off it during that period?

A. I don't know. I have seen hay where the teams—you could hardly see the team.

Q. You didn't answer my question. How much, what tonnage did you get off it at any time?

A. Oh, it must be a rough guess; three ton to the acre.

Q. From how many acres?

A. About 30 or 40 acres we put in.

Q. What is the tax on that acreage?

A. The tax?

Q. Yes, a year? A. Really, I don't know.

Q. You paid the taxes and you don't know?

A. You mean by the acre? [166]

Q. What taxes did you pay for that acreage during that period that you owned this since 1912?

(Testimony of James H. Riley.)

A. The 1800 acres we paid about $150.

Q. How many acres did you say was in this piece, altogether? A. About 1800.

Q. 1800 acres, and you bought it for $7 and sold for—— A. Twelve and a half.

Q. Twelve and a half?

A. It is in the rough country.

Q. Who did you sell it to?

A. A fellow by the name of Godetti.

Q. What does he do with it?

A. He is running cattle on it.

Q. How many cattle, do you know? Have you any idea? A. You mean that I run there?

Q. Yes.

A. Oh, I used to run probably 200 head on that.

Q. Is that all the taxes for 1800 acres?

A. I think it was $160. We got a receipt on it.

The Court: Is that all from this witness?

Mr. Licking: That is all.

Mr. O'Connor: That is all, Mr. Riley.

COY SWINDLE,

Called on behalf of the Plaintiff in Rebuttal; sworn.

The Clerk: Please state your full name to the Court. A. Coy Swindle.

(Testimony of Coy Swindle.)

Direct Examination

Mr. O'Connor: Q. Mr. Swindle, what is your business or occupation?

A. Field superintendent for Hardin Packing Company.

Q. What business are Hardin Packing Company engaged in? A. Produce, fresh vegetables.

Q. Do they farm in Salinas Valley?

A. Yes, sir.

Q. Are you familiar with the values of rentals and the values of [167] land in that valley down there? A. To a certain extent, yes.

Q. Do you know where the Frank Dougherty place is? A. Yes, sir.

Q. Are you familiar with the twenty acres southwest of the Frank Dougherty house on the River Road?

A. I am familiar with most of the ranch.

Q. Do you know where the horse barn is and the corrals immediately south of the Dougherty ranch house? A. South of his house, yes, sir.

Q. And you are familiar with that particular twenty acres that contain that barn, corrals, and the hay field below it?

A. Yes, I have horses in there now.

Q. And the grazing land there, too?

A. That is right.

Q. What you say, considering the water supply there, the corrals, the barn, the hay field, and the

(Testimony of Coy Swindle.)

grazing field, that a rental of $20 a month would be an excessive rental per month—$20 per year per acre would be an excessive rental?

A. I would say it all depends on what you are going to use it for.

Q. Tell me, do you think for any purpose that it would be excessive, $20 an acre per year?

A. If you would raise lettuce on it, it would be worth a hundred, $75.

Q. Do you think that land is adaptable for lettuce?

A. Part of it could be raised lettuce on; they do across the road.

Q. Can you tell me whether or not, assuming that the land was to be used for the purpose of running stock on it, or grazing land, or was for a combination of stock and the raising of chickens, would you say that $20 per acre per year would be an excessive rental?

A. It doesn't sound excessive to me.

Mr. O'Connor: Cross-examine.

Cross Examination

Mr. Licking: Q. Do you run some stock, yourself? A. Horses, yes, sir. [168]

Q. You say you have them on this particular piece of land?

A. I have two at the present time.

Q. Oh. How long have you had the two there?

A. Since June, '35.

(Testimony of Coy Swindle.)

Q. Since June, '35. What do you feed them?

A. $2 a month.

Q. What do you feed them?

A. Oh, pasture. I don't feed them anything but grass.

Q. Two of them?

A. Two there at that particular time. I have nine head on the ranch.

Q. Are you familiar with the amount of stock that that land will carry per acre per year?

A. Well, various numbers. I don't know how many they carry on an average.

Q. What I am trying to get at is this—let me see if I can express myself so you understand me: Are you familiar with the stock business at all, yourself? A. Some.

Q. Do you know, then, what I mean by the carrying capacity of range? A. Certainly.

Q. Well, now, then, what is the carrying capacity of that range in that District? How many acres do they figure necessary to run an animal per year?

A. The whole ranch, or this particular——

Q. I don't mean the whole ranch; I mean this particular area, this ten acres—we will say ten acres that apparently is rolling pasture.

A. Well, all I know, I see anywhere from say ten to twenty horses there most of the time.

Q. Don't you see that they are being fed hay also? A. Part of the time.

(Testimony of Coy Swindle.)

Q. I am asking you again if you know anything about the carrying capacity of land of that type, itself? A. I couldn't testify to that.

Q. If you bring in feed from the outside I imagine there is room to line up in that twenty acres maybe 100 or 150 head of stock just to hold them there and feed them. A. Sure. [169]

Q. Just what is the carrying capacity of that type of land there when you rely on the productive capacity of the land, alone?

A. I am not familiar enough with it from that standpoint to say.

Mr. Licking: That is all.

Mr. O'Connor: That is all.

That is the Plaintiff's case, if your Honor please.

Mr. Mathewson: No further testimony.

[Endorsed]: Filed March 26, 1940. [170]

[Endorsed]: No. 9492. United States Circuit Court of Appeals for the Ninth Circuit. Frank A. Dougherty, Appellant, vs. John V. Lewis, Former Collector of Internal Revenue for the First District of California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 12, 1940.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

No. 9492

FRANK A. DOUGHERTY

Appellant

vs.

JOHN V. LEWIS, former Collector of Internal Revenue for the First District of California,

Respondent

STATEMENT OF POINTS ON APPEAL

Appellant upon this appeal will rely upon the following points:

I.

That the evidence is insufficient as a matter of law to support the judgment rendered in favor of defendant and respondent.

II.

That on all the evidence submitted, the trial court should have rendered judgment in favor of plaintiff and appellant.

III.

That the trial court erred as a matter of law in holding upon the evidence submitted that plaintiff and appellant was a [171] "person in any manner interested in the use of a still, etc.", within the meaning of Title 28, U. S. C. A., Section 1150, Subdivision (c), paragraph (d).

IV.

That the judgment in favor of defendant and respondent is wholly unsupported by the evidence.

V.

That the findings of fact are wholly unsupported by the evidence.

VI.

That the conclusions of law are erroneous in that they are wholly unsupported by the evidence.

Dated: April 12, 1940.

FAULKNER & O'CONNOR
Attorneys for Appellant

Receipt of a copy of the within Statement of Points on Appeal is hereby admitted this 12th day of April, 1940.

FRANK J. HENNESSY
United States Attorney
By W. F. MATHEWSON
Attorney for Respondent

[Endorsed]: Filed April 12, 1940. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION OF APPEAL

Appellant hereby designates the following parts of the record which he deems necessary for a consideration of this appeal:

1. Complaint.
2. Answer.
3. Judgment.
4. Order directing judgment in favor of defendant.
5. Memorandum opinion.
5. Findings of fact and conclusions of law.
6. Plaintiff's proposed findings of fact and conclusions of law.
7. Notice of entry of judgment. [172]
8. Notice of motion for a new trial.
9. Motion for a new trial.
10. Notice of order denying motion for a new trial.
11. Notice of appeal.
12. Cost bond.
13. Stipulation and order re record on appeal.
14. Orders extending time to docket appeal.
15. Stipulation and order for transfer of records, exhibits and reporter's transcript of testimony.
16. Exhibits introduced at the trial.
17. Reporter's transcript of testimony taken at the trial.
18. Certificate of clerk of District Court.
19. Statement of points on appeal.
20. Designation of Parts of the Record necessary for Consideration of Appeal.

Dated: April 12, 1940.

FAULKNER & O'CONNOR
Attorneys for Appellant

Receipt of a copy of the within Designation of Parts of the Record necessary for Consideration of Appeal is hereby admitted this 12th day of April, 1940.

FRANK J. HENNESSY
United States Attorney
By W. F. MATHEWSON
Attorney for Respondent

[Endorsed]: Filed April 12, 1940. Paul P. O'Brien, Clerk. [173]

No. 9492

IN THE 14

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK A. DOUGHERTY,

Appellant,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue for the First District of California,

Appellee.

APPELLANT'S OPENING BRIEF.

FAULKNER & O'CONNOR,
Balfour Building, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Textbook

No. 9492

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK A. DOUGHERTY,

Appellant,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue for the First District of California,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF BASIS OF ORIGINAL AND APPELLATE JURISDICTION.

The jurisdiction of the District Court is based upon Section 24, Subdivision 5 of the Judicial Code, as amended (28 U.S.C.A., Section 41, Subdivision 1) giving the District Courts jurisdiction "of all cases arising under any law providing for Internal Revenue". The jurisdiction facts are alleged in the complaint. (R. pp. 1-20.)

The jurisdiction of this Honorable Court is based upon Section 128 of the Judicial Code, as amended (28 U.S.C.A., Section 225, Subdivision (a)), vesting appellate jurisdiction to review final decisions of the

District Courts, in all cases except where a direct review may be had under Section 238 of the Judicial Code, as amended. (28 U.S.C.A., Sec. 345.) The judgment (R. p. 36) denying appellant the relief sought is a final decision.

STATEMENT OF THE CASE.

On May 4, 1938, appellant filed a complaint (R. pp. 1-20) against the former Collector of Internal Revenue for the First District of California, praying the recovery of the sum of $3,557.83, and interest thereon as provided by law, which said sum had been assessed and collected by the former Collector from appellant, for and on account of taxes alleged to be due, under the provisions of Section 3251, Revised Statutes of the United States (26 U.S.C.A., Section 2800, Subdivision (d)), upon distilled spirits produced at a distillery. The complaint alleged the filing with the respondent of a claim for refund of the moneys collected by respondent and the rejection by the Commissioner of Internal Revenue of the Treasury Department of the United States of the claim for refund. (R. p. 4.) The respondent by his answer (R. p. 21) admitted all the allegations of appellant's complaint, save and except the averment contained in paragraphs XII and XIII thereof. The cause was tried by the Court without a jury and on August 8, 1939, the District Court filed a memorandum opinion (R. pp. 22-26) directing judgment for respondent and against appellant.

Findings of fact and conclusions of law were made by the District Court on October 17, 1939 (R. pp. 30-34) and on October 19, 1934 judgment on findings was entered against appellant and in favor of respondent. (R. pp. 35, 36.) Appellant appeals from this judgment. (R. p. 41.)

The sole question for determination by the District Court was, whether under Section 3251, Revised Statutes of the United States (26 U.S.C.A., Section 2800, Subdivision D) the appellant was *such a person* as described in that section, and therefore liable for taxes due on distilled spirits produced at a distillery.

Section 3251 of the Revised Statutes of the United States (26 U.S.C.A., Section 2800, Sub. (d)) provides:

> "Every proprietor or possessor of and every person in any manner interested in the use of, any still, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom."

A SUMMARY OF THE EVIDENCE.

The stenographic reporter's transcript of the evidence taken at the trial below has been designated and included as part of the record on appeal, pursuant to Rules of Civil Procedure, Rule 75.

The evidence adduced at the trial was substantially as follows:

Appellant, in support of his complaint, testified that he was a resident of Monterey County, California, for

20 years prior to the trial and that he farmed a ranch in said county of some 1500 acres. He was not the owner of the ranch but rented the same from one Robert Fatjo; that during October, 1939, he subleased 20 acres of said ranch to certain men; that included in said 20 acres was a barn and two outhouses; that he was to receive as rent the sum of $400.00, or $20.00 an acre a year; that he actually received as rent the sum of $200.00; that he received no other moneys; that on June 3, 1935, he was arrested at his home on the ranch by agents of the Alcohol Tax Agents of the Internal Revenue Department and was taken by them to the barn on the 20 acres he had rented and there saw a still; that until then he had no knowledge of the presence of the still; that he had no interest in the still, that he had invested no money in it; that he was not to receive any of the profits from its operation and that he did not receive any of the profits therefrom; that he was tried on charges concerning the still in question and was by a jury acquitted.

That thereafter the Internal Revenue Department assessed taxes against him and the men found operating the still, on alcohol alleged to have been produced at the still; that thereafter the Collector served a warrant of distraint on the Spreckels Sugar Company, restraining moneys due him and that he paid to the Collector under protest the amount which is the basis of his present suit against the Collector.

On cross-examination he denied knowledge of the existence of the still and any interest therein; that he paid about $2,000.00 rent for the entire farm.

The major portion of his cross-examination is devoted to questions and answers concerning his knowledge of the existence of the still and to whether or not he was receiving an excessive rent. Since the Court below found on conflicting evidence that he had knowledge of the existence of the still and that he did receive excessive rent for his premises, appellant does not on this appeal contest the finding of the trial Court on these questions and therefore, does not summarize the evidence thereon. (R. pp. 50-88.)

The respondent called Robert A. Fatjo, the owner of the ranch, who testified he rented the ranch to appellant for the sum of $2,000.00 a year. (R. pp. 88-92.)

Philip S. George, sales manager of the Pacific Gas & Electric Co. at Salinas, who testified concerning certain applications for power, two by the admitted operators of the still during the time the still was in operation and one by appellant after the seizure of the still by the agents of the Internal Revenue Department. (R. pp. 93-106.)

Edward C. Harkins (R. pp. 106-116), Fred L. Myers (R. pp. 117-123), Claude M. Shanks (R. pp. 123-127), all agents of the Alcohol Tax Unit of the Department of Internal Revenue, testified to facts concerning the discovery and seizure of the still in question and the arrest of appellant and the persons actually operating the still.

Guy J. Pedroni (R. pp. 127-141), Jacob J. Bandour (R. pp. 142-149), Herbert Baltz (R. pp. 149-156), testified in effect, that the rental of $400.00 a year for the 20 acres subleased by appellant was excessive.

Julius Bianchini, one of the operators of the illicit still testified that appellant knew the 20 acres was to be used for a still and that appellant was to receive a rental of $125.00 a month and that he paid appellant on three occasions. On cross-examination, he was uncertain as to the times or amounts paid appellant. (R. pp. 156-172.)

Guiseppi Biagi, another of the illicit still operators, testified appellant knew the use to which the leased property was to be put and that appellant was to receive a rental of $125.00 a month. On cross-examination, he testified that he and Bianchini were the proprietors of the still and that appellant had no interest in the still and did not, and was not to receive any profits therefrom, nor was he to assume any losses. (R. pp. 173-187.)

Angelo Rodoni, testified appellant knew the still was to be operated on the 20 acres leased and that the rent was to be $125.00 a month. (R. pp. 187-201.)

Kasper E. Cadle (R. pp. 209-211), Angelo V. Riandi (R. pp. 212-223), James H. Riley (R. pp. 222-227), Coy Swindle (R. pp. 227-231), called as witnesses by appellant in rebuttal testified the rental of $400.00 a year, was not excessive.

SPECIFICATIONS OF ERROR.

I.

The evidence is insufficient as a matter of law to support the judgment in favor of respondent. (Statement of Points on Appeal, R. p. 232.)

II.

The trial Court erred in a matter of law in holding under the evidence that appellant was within the meaning of Section 3251 of the Revised Statutes (Section 2800 (d) of Title 26, United States Code Annotated) a "person interested in the use of the still, distillery and distilling apparatus. (Statement of Points on Appeal, R. p. 232.)

ARGUMENT.

The evidence is insufficient to support the judgment and the trial Court erred in holding appellant liable for the taxes in question.

Appellant will argue both Specifications of Error, under the same heading because the law applicable thereto is the same.

Section 3251 of the Revised Statutes (Section 2800 (d) of Title 26, United States Code Annotated) provides:

> "Every proprietor or possessor of and every person in any manner interested in the use of any still, distillery or distillery apparatus shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom."

That appellant was not a "proprietor or possessor", within the meaning of the statute is conceded by the conclusions of law of the trial Court wherein the Court held "plaintiff was a person interested in the use of

the still, distillery and distilling apparatus. (R. pp. 33-34.)

The only question, in the opinion of appellant, to be here determined is whether on the evidence appellant was "a *person interested in the use of any still*", etc.

A great amount of the evidence is devoted to the question of appellant's knowledge concerning the operation of the illicit still in question and concerning whether or not he received an excessive rent for the premises leased by him. Appellant takes the position his knowledge of the operation of an *illicit* still is immaterial to the question of tax liability because the statute in question taxes the distilled spirits produced from any still whether *illicit* or *licensed*. Appellant here, therefore, makes no point concerning his lack of knowledge. Appellant likewise takes the position that the question of whether or not the rental received was excessive is likewise immaterial. We are not here concerned with any criminal responsibility of appellant. He has had his day in Court on that issue and was absolved by a jury of his peers. We are here concerned solely with a *"revenue measure"* or a "taxing statute".

The provisions of the statute were adopted solely to secure to the Government the payment of the taxes imposed by law on distilled spirits. The tax is payable to the Government whether the spirits were produced legally or illegally.

United States v. Ulrice, 111 U.S. 38, 4 S. Ct. 288;

Colletti v. Cassidy, 12 Fed. Sup. 21;
United States v. Van Slyke, Vol. 28, Fed. Cases, No. 16610.

Taxing statutes in case of doubt are to be construed in favor of the taxpayer.

In connection with an interpretation to be given the statute in question, the Court should take into consideration that if there is any doubt concerning the liability of the appellant herein for the tax due on the distilled spirits produced on the premises he rented, that doubt should be resolved in favor of the appellant and against the Government.

In *Gould v. Gould,* 245 U.S. 151, 38 S. Ct. 53, the Supreme Court said:

> "In the interpretation of statutes levying taxes, it is the established rule not to extend the provisions by implication beyond the clear import of the language used or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly against the Government and in favor of the citizen."

The rule quoted above was again approved by the Supreme Court in *United States v. Merriam,* 264 U.S. 179, 44 S. Ct. 69 at 71.

WHO IS "A PERSON IN ANY MANNER INTERESTED IN"?

It is the position of appellant that a landlord or a lessor is not a "person in any manner interested in" within the meaning of the statute in question.

Under the doctrine of *ejusdem generis,* where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same nature or class as those enumerated.

59 *Corpus Juris,* 981, Sec. 581.

The statute with which we are concerned, by its language, makes liable for the tax in question "every proprietor or possessor of and every person in any manner interested in the use of". Thus, we contend the particular class of persons liable for the tax by virtue of the statute are "proprietors or possessors of" and then follow the general words "every person in any manner interested in the use of". Thus under the doctrine of *"ejusdem generis"* "every person in any manner interested in the use of" refers back to "proprietor or possessor of", so that to be liable for the tax involved, a person must be a proprietor or possessor of or have an *interest in the losses or profits, and the successes or failures of the business in question or stand in the relation of a partner or shareholder.* It must be conceded by the respondent, for he did not contend in the trial Court, nor did the trial Court find, that appellant was "a proprietor or possessor of" as defined in the statute.

What does the word "interest" mean? It is defined in Webster's New International Dictionary as a "right, title, share or participation in advance, profit and responsibility, as an interest in a brewery".

Is the rent received by a landlord such an "interest"? We respectfully submit that it is not.

Counsel for appellant has been able to find only one case in point construing the statute in question and the construction there given conforms to the contention made on this appeal. In *United States v. Van Slyke,* supra, the facts were substantially as follows:

The Government sued Van Slyke to recover the taxes alleged by the Government to be due on illicit distilled spirits produced at a licensed distillery. The facts showed that one Rogers and one Bunker had the immediate control and management of the business of the distillery, that Van Slyke was the owner of the property. The property had previously been owned by a person named Lentz and that the distillery business had previously been conducted by Lentz and Rogers, that Van Slyke as president of the bank advanced money to Lentz and Rogers and discounted their paper, that to secure these advances Van Slyke took a mortgage on the distillery premises from Lentz, that subsequently this mortgage was foreclosed and the premises bid in by Van Slyke; that subsequently Van Slyke leased the premises to Rogers; that thereafter distilled spirits were produced at the distillery. Thereafter, Rogers and Bunker manufactured illicit wines and spirits which they removed from the distillery and rectified without payment of the tax. That subsequently the distillery and the property where seized and forfeited to the Government. It was the contention of the Government that Van Slyke was liable for the tax because he was the owner and proprietor of the distillery premises and was interested in the profits of the distillery because of the moneys

he had advanced to the persons operating the distillery. The suit was tried before a jury and the Court in instructing the jury said:

> "The defendant admits and the evidence shows that he was the owner of the premises on which the distillery was situated, but he denies that he was the proprietor in the sense in which that word is used in the statute and denies that he had any interest in the use of the still. * * * I think the word 'proprietor' is used in the statute in the sense of an owner who whether in personal possession or not has the exclusive right to and the control over the premises. A person in possession of the premises as lessee under a lease for years, has himself, as against the general owner and all the world, the right to the exclusive possession, control and management of the same during the continuance of the lease, and is for all such purposes as much the proprietor of the premises, for the time being, as though he held the legal title in fee. And I think it was never the intention of the law to make the general owner of premises so leased, and not himself having any right to the possession, control or management of the premises or business carried on, and having no interest in the distillery business except to receive his stipulated rent, liable for the payment of the taxes imposed by the government on the spirits distilled."

The evidence of both appellant and respondent in this case conclusively showed that the appellant herein was not interested in the profits or losses of the distillery business conducted on the premises in question.

He was to receive nothing except the rent for the premises he had leased. He did not in any manner participate in the business there conducted. The evidence does not show that at any time while the distillery was on these premises that the appellant was ever upon the premises or that he in any manner had possession or control thereof or of the business therein conducted.

It was said in *United States v. Van Slyke,* supra:

> "But it would be necessary to go further and show that he had an interest in the distillery business itself."

The facts in the *Van Slyke* case show Van Slyke not only was interested in receiving his rents, but also was interested in collecting the debt due him for moneys he had advanced to the operators of the distillery, whereas, in this case, the evidence shows that the only interest of the appellant was in the collection of his stipulated rent.

The question of whether appellant had knowledge that the still was being illegally operated on his premises is immaterial on the question of his liability for the payment of the tax. We are not here dealing with the question of whether or not the appellant was criminally liable for the operation of an illicit distillery on his premises. We are dealing merely with the construction of a taxing statute and in this connection, it was said in *United States v. Van Slyke,* supra:

> "Again, the jury will understand that the defendant's liability to the payment of the tax, turns

upon the question of his being a proprietor or possessor of the still, or interested in the use of the still, and not upon the question of his knowledge or want of knowledge, as to how the distillery was being run, whether 'straight' or 'crooked'. So that the fact of defendant's having notice that illicit wines were being made by Rogers at the distillery would not make him liable for the tax, if all the interest he had in the success of the business was to collect the debt due the bank for rent and for moneys advanced."

In *Doyle v. Scott, et al.* (Tex. Civ. A.), 134 S. W. 829, the following situation was presented to the Court of Appeals of Texas: Appellant sued as a private citizen and property owner to enjoin one Barfield and one Scott from engaging in selling spirituous liquors, etc., at retail in certain retail premises located in a hotel in Fort Worth, Texas. The Texas law provided that each person, where one or more desire to obtain a liquor dealers license, must state his name in the application therefor and swear "that no other person or corporation is in any manner interested in or to be interested in the proposed business". The evidence showed that the particular saloon in question was operated by Barfield and that the application for the license had been signed by Barfield alone and the license issued to Barfield alone. The premises where the saloon was operated by Barfield was owned by one Scott. The evidence showed that Scott received the sum of $150.00 a month rent and that after all expense had been paid and after Barfield had received a draw-

ing account of $100.00 a month, the profits over and above were divided equally between Barfield, the operator of the saloon, and Scott, the owner of the premises. It was the contention of the appellants in these proceedings, because of this arrangement Scott was a person interested in the business.

The Court said:

> "This state of facts does not constitute Scott a partner or 'in any manner interested in' the business within the meaning of the law cited. *The 'interest' meant by the law means something more than the general interest every landlord has to receive the desired rentals for the use of his property. It must mean some interest in the business itself.* A quotation from Parsons on Partnership may be looked to in illustration. He says: 'Where the owner of property leases it for business purposes, agreeing to receive in rent a proportion of the profits of the business, he receives the amount merely as rent and not as a partner in the business.' "

In *Doyle v. Scott,* supra, the landlord was to receive not only his stipulated rent, but over and above, *was to share equally in the profits of the business,* after allowing the owner a drawing account of $100.00 a month.

In the present case appellant, according to the testimony of the witnesses for both sides, was to receive nothing but his rent. It was not to share in the profits or losses. Under the ruling in *Doyle v. Scott,* supra, the fact that appellant's rent was excessive

would not, make him "a person in any manner interested in the use of any still, etc."

In construing who are persons interested in the use of a still or distillery, the Supreme Court of the State of California has held in *Ricter v. Henningsen,* 110 Cal. 530, that where a corporation was engaged in the business of distilling that a stockholder of the corporation was a person "interested in the use of the still, etc., owned by the corporation and used in its business within the meaning of the statute here under consideration".

The Court there said:

> "A stockholder in a private corporation for profit is not in any proper sense the owner of the property of the corporation as such. He has, however, a direct interest in the corporation. In Plimpton v. Bigelow, 93 N.Y. 591, it was said: 'The owner, being a shareholder in a corporation, has by reason of his ownership of shares, a right to participate according to the amount of his stock in the surplus profits of the corporation on a division and ultimately on its dissolution in the assets remaining after payment of its debts."

The above cited case is authority for the position of appellant that to be a person liable for the tax herein in question, he must have had an interest in the profits or losses, in the success or failure of the still in question.

We submit under the authorities cited that the rent received by a landlord for premises where a still is operated, does not render the landlord a person in

"any manner interested in the use of a still, etc." within the meaning of the statute under discussion. This is true whether the rent be excessive or not. He received nothing but his stipulated rent. This he receives whether the still makes money or loses money. He has no other interest in the still.

CONCLUSION.

We, therefore, respectfully submit the judgment of the District Court should be reversed because,

I. The evidence is insufficient as a matter of law to support the judgment in favor of respondent.

II. The trial Court erred in a matter of law in holding under the evidence that appellant was, within the meaning of Section 3251 of the Revised Statutes (Section 2800 (d) of Title 26, United States Code Annotated) "a person interested in the use of the still, distillery or distilling apparatus".

Dated, San Francisco,
June 10, 1940.

Respectfully submitted,
FAULKNER & O'CONNOR,
Attorneys for Appellant.

No. 9492

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK A. DOUGHERTY,

Appellant,

vs.

JOHN V. LEWIS, former Collector of Internal Revenue for the First District of California,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 9492

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Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF BASIS OF ORIGINAL AND APPELLATE JURISDICTION.

The appellee concurs with appellant in his statement of the basis of the original and appellate jurisdiction.

STATEMENT OF THE CASE.

The appellee concurs with the appellant in his statement of the case.

SUMMARY OF THE EVIDENCE.

The summary of the evidence made by the appellant is truthful but, in appellee's opinion, is not sufficiently comprehensive. Appellee believes that the following statements should be added to the summary of the evidence:

Julius Bianchini also testified that the appellant was told that they wanted just the barn to operate a still, with enough land to get to the barn, maybe five or ten acres, and that the lease was prepared to "save" the appellant; that they moved in in October, 1934, took thirty days to set up the still and operated 21 or 22 days, then ceased operations for four months when they again operated 13 days; that they paid appellant $125.00 twice in 1934 and $125.00 when they resumed operations in 1935.

Guiseppi Biagi also testified that they told the appellant they wanted only the barn and the front and that appellant included the 20 acres; that the still was shut down after 21 or 22 days because alcohol was so cheap they could make no profit.

Angelo Rodoni also testified that they told appellant they wanted to rent the barn to make whiskey and that they would make a lease to show it was rented for cattle.

SPECIFICATIONS OF ERROR.

Appellee denies that the trial Court committed the two specified errors and asserts:

I.

The evidence is sufficient as a matter of law to support the judgment in favor of respondent (appellee) and

II.

The trial Court did not err in a matter of law in holding under the evidence that appellant was, within the meaning of Section 3251 of the Revised Statutes (Section 2800 (d) of Title 26, United States Code Annotated) a "person interested in the use of the still, distillery and distilling apparatus".

ARGUMENT.

QUESTION.

Appellee concedes that the appellant was not a "proprietor or possessor" within the meaning of the statute.

Appellee concedes that the only question to be determined is whether on the evidence appellant was a *person in any manner interested in the use of any still,* distillery or distilling apparatus.

KNOWLEDGE AND EXCESSIVE RENTAL.

The appellant admitted on page 5 of appellant's opening brief that the trial Court found on conflicting evidence that appellant had knowledge of the existence of the still and that appellant did receive

excessive rent for his premises. Appellant also stated that he would not contest the findings of the trial Court on these questions.

As pointed out in the appellee's summary of the evidence the appellant's summary is too narrow. The findings of the Court with respect to knowledge and rent are broader than admitted by appellant. The pertinent findings are in Findings of Facts and Conclusions of Law, paragraph II (Tr. pp. 31 and 32).

Assuming, however, that the trial Court found that appellant only had knowledge of the operation of the illicit still (rather than actively entering into an agreement for its establishment and concealment) and that appellant only received excessive rental (rather than an amount of money so disproportionate to rental it could no longer be called rental, paid at times coincidental with the profitable operation of the distillery), such knowledge and rental are not immaterial. Without knowledge of the operation the appellant could not under any construction of the statute be interested in the distillery.

As the trial Court pointed out in its memorandum opinion (Tr. p. 25), the Court in the case of *United States v. Van Slyke,* 28 Fed. Cas. 363 (Case No. 16,610), relied upon by appellant (Appellant's Opening Brief p. 11), stated on page 365:

> "But his knowledge, if he had such knowledge, that the distillery was being run contrary to law and that the taxes were not being paid, and his conduct in relation thereto, are all to be considered as part of the evidence in this case, and it is for

you to say how far they bear upon the question of his interest in the distillery business."

PURPOSE OF SECTION 2800 (d).

Appellee admits that the provisions of the statute were adopted to secure to the government the payment of the taxes imposed by law on distilled spirits and that the tax is payable to the government whether the spirits are produced legally or illegally.

TAXING STATUTES IN CASE OF DOUBT ARE TO BE CONSTRUED IN FAVOR OF THE TAXPAYER.

The appellant has cited two cases in support of the proposition "Taxing statutes in case of doubt are to be construed in favor of the taxpayer". The cases are not authority for the proposition. Both cases merely hold that a statute *levying* a tax must not be construed to embrace matters not specifically pointed out, i. e., the subject matter of the levy. In the case at bar the tax is levied on distilled spirits and the section in question is intended to prevent the evasion of the tax.

Section 2800 (d), of Title 26, United States Code Annotated which is derived from Section 1 of the Internal Revenue Laws of 1868 is not only a tax measure, it is one of the Internal Revenue Laws and as such, unlike a penal law, it is not to be strictly construed, nor is it like a remedial statute, to be construed

with extraordinary liberality, but it should be so construed as most effectually to accomplish the intention of Congress in passing it.

U. S. v. Stowell, 133 U. S. 1, 12.

One of the purposes of Section 2800 (d) is the prevention of fraud upon the Government. In *United States v. Wolters, et al.* (S. D. Cal. 1891), 46 Fed. 509, 510, the Court stated with respect to this section now under consideration, and its provision:

> "Revenue laws are not, like penal laws, to be strictly construed, nor are they, like remedial statutes, to be construed with extraordinary liberality; but they should be so construed 'as most effectually to accomplish the intention of the legislature in passing them'. *Taylor v. U. S.,* 3 Howard 197. The provisions of the law are rigid, and in some instances perhaps arbitrary, in their operation. But they were designed to prevent frauds upon the government, and whoever engages in business by virtue of their provisions must be governed by them."

WHO IS "A PERSON IN ANY MANNER INTERESTED IN"?

Appellant states that it is his position that "a landlord or a lessor is not a 'person in any manner interested in', within the meaning of the statute in question".

As a logical matter, a landlord or a lessor could be "a person in any manner interested in" the use of a still just as he could be a "proprietor" or "possessor" of a still. The fact that a person is a landlord or a

lessor of premises upon which a distillery is located does not in itself remove him from the purview of the statute.

If a person were a landlord or a lessor of premises upon which a properly registered and bonded distillery operated and the landlord's only financial interest was a reasonable and normal rent the appellee would admit that the landlord or lessor was not a person interested in the distillery.

If, however, a person were a landlord or a lessor of premises upon which an unregistered, unbounded, illegal distillery were in operation with the landlord's knowledge, appellee contends that the landlord or lessor would be a person interested in the use of the distillery. The purpose of Section 2800 (d) was to prevent frauds upon the Government.

> *United States v. Wolters, et al.* (S. D. Cal. 1891), 46 Fed. 509, 510.

A landlord or lessor of premises upon which an unregistered, unbonded distillery is operated with the knowledge of the landlord or lessor, definitely aids the operators in perpetrating a fraud upon the Government.

The appellant in this case, however, was more than a landlord with mere knowledge that an illicit distillery was operated on the leased premises and that the source of his rental was the profits of the illegal enterprise. The appellant was "interested in" the use of the still even within the narrow definition of the phrase as devised and stated on page 10 of the

appellant's brief. The appellant was interested in the losses and the profits and the success and failure of the business. The appellant was advised by the still operators that they wanted the barn to operate a still; that they wanted only enough land for ingress and egress to the barn; that they would sign a lease to "save" the appellant; and that the rental would be $125.00 per month (so disproportionate to the actual rental value as to cease to be rent). Thus with full knowledge of the enterprise the appellant permitted the operators to consummate upon his property a tax evading scheme; he effectively furnished them more than the use of a barn or land or water. By agreement made before the enterprise was established, he furnished a vital element of the enterprise, concealment. This was far more than mere knowledge of the existence of a still acquired after it was in operation. The so-called "rent" appellant received was not only excessive but was paid only when the distillery was profitably operating. The still was set up and operated 21 or 22 days. "Rent" was paid for October when it was set up and for November when it was operated. The still shut down for four months because no profit could be made and during that time no "rent" was paid to appellant. "Rent" was paid again when operation was resumed.

Appellant had no right to rental for the premises because they were knowingly leased for an unlawful purpose and surely the use of a term "rental" cannot be successfully employed to conceal a payment from the profits of a still for furnishing a place of

concealment especially when that term is knowingly employed to enable the appellant to escape his tax and criminal liability.

The *Wolters* case demonstrates that the Court should so construe Section 2800 (d) as to prevent the appellant here from successfully consummating a planned fraud upon the revenue.

The appellant certainly knowingly assisted Biagi, Bianchini and Rodoni in the perpetration of a fraud, and most certainly, if it is possible to so construe Section 2800 (d), it should be construed to prevent the successful perpetration of a fraud upon the revenue.

That the language "interested in" has been interpreted to mean "assist" is shown by the case of *Brown v. State,* (Ark. 1923), 255 S. W. 878, 879, where the Court stated:

> " 'Where the intermediary between the purchaser and the seller is a necessary factor, without whose assistance the sale of liquor could not have been consummated he is interested in the sale, in the sense of the law, whether he has * * * pecuniary interest or not'."

Surely in the instant case appellant was an intermediary who made possible the utilization of his land by men whom he knew intended to use that land to defraud the revenue. He assisted them in the consummation of an illegal, fraudulent enterprise. Without appellant's assistance in furnishing a place of concealment the fraudulent enterprise would not have been possible.

It is respectfully urged that a construction which necessitates the finding of pecuniary interest will be contrary to the intention of Congress in the enactment of this legislation.

Reference is respectfully made to the discussions that occurred and the debates that were had in the House of Representatives, commencing on June 23, 1868, and continuing until the final enactment and approval of this Section as Section 1 of an *"Act imposing taxes on distilled spirits and tobacco and for other purposes"*, 40th Congress, Session II, Chapter 186, approved July 20, 1868, 15 Stats. 125. These discussions and debates may best be summarized by a statement that at the time of the consideration of this Section immediately following the Civil War, the Fortieth Congress had under consideration methods and means of circumventing and preventing frauds in connection with the distillation of distilled spirits that had assumed such huge proportions that Congress felt that it was necessary to the very safety of the Government to take steps to break the stranglehold of a large group of illicit distillers and corrupt Internal Revenue Agents known as the "whiskey ring". To accomplish this purpose Congress revamped the Internal Revenue Laws, reduced the taxes from $2.00 per gallon to 50 cents per gallon and changed the place for tax payment from the bonded warehouse to the distillery itself. That Congress intended that this Section should be strictly construed must be evident from the debates which demonstrated

that it was Congress' supreme effort to prevent tax evasion.

Although there was no direct debate with respect to this particular provision of Section 1, that Congress intended to make liable persons other than proprietors or possessors of stills is evident from the amendment offered by Senator Morrill of Vermont appearing on page 3831 of Vol. 152 of the Congressional Globe, Pt. 4, 2nd Session, 40th Congress. There Mr. Morrill proposed an amendment:

> "I desire to propose a few amendments, to which I think there will be no objection, which are merely verbal. On page 27, line 16 of Section Twenty-one, after the word 'distiller', I move to insert 'or other persons liable'. By reference to page 2, line fourteen of section one, it will be seen that there are some other persons who may be liable and therefore, they ought to be included here.
>
> The amendment was agreed to."

Section 1 as referred to in this quotation, appears as Section 1 of Page 3738 of Volume 152 of the Congressional Globe:

> *"Be it enacted, &c.,* That there shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid, a tax of fifty cents on each and every proof gallon, to be paid by the distiller, owner, or person having possession thereof before removal from distillery warehouse; and the tax on such spirits shall be collected on the whole number of gauge or wine gallons when below proof, and shall be increased in proportion for any greater strength

than the strength of proof-spirit as defined in this act; and any fractional part of a gallon in excess of the number of gallons in a cask or package, shall be taxed as a gallon. Every proprietor or possessor of a still, distillery, or distilling apparatus, and every person in any manner interested in the use of any such still, distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom and the tax shall be a first lien on the spirits distilled, the distillery used for distilling the same, the stills, vessels, fixtures, and tools therein, and on the lot or tract of land whereon the said distillery is situated, together with any building thereon, from the time said spirits are distilled until the said tax shall be paid."

Section 21 there referred to appears as Section (19) 20, on page 3746 of Volume 152 of the Congressional Globe:

"Sec. (19) 20. *And be it further enacted,* That on the receipt of the distiller's first return in each month the assessor shall proceed to inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of spirits produced from the materials used shall be ascertained; and forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller

shall have been [less than the quantity thus ascertained, the distiller] (line 16) shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per cent, of the producing capacity of the distillery."

As amended, Section 21 appears as Section 20 in the Act, 15 Statutes at Large 133:

"Sec. 20. *And be it further enacted,* That on receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller *or other person liable* (Italics ours) shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of four dollars for every cask of forty proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned

> by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty percentum of the producing capacity of the distillery, as estimated under the provisions of this act."

It is apparent from the provisions of Section 2815 (b) (1) of Title 26 U.S.C.A., that Congress had under consideration the problem of tax collection when the distillery premises were owned by one other than the distiller. It is there provided in substance that a lessee distiller cannot establish a bonded distillery unless he first files with the Collector the written consent of the lessor, in which the owner must consent that the premises may be used for distilling spirits, that the lien of the United States for taxes and penalties shall attach to the land and that in the event of forfeiture of the distillery or any parts of it, title to the land shall vest in the United States.

Section 2833 of Title 26, which appears as Section 44 of the Act as passed in 1868, provides that if the owner of real estate suffers or permits the carrying on of the business of a distiller upon his land without the distiller giving a bond or if the owner of the land connives at the same, that all of the owner's right, title and interest in the land shall be forfeited. That section also provides that the interest of every person in any premises used for ingress or egress to or from the distillery, who has knowingly suffered or permitted his premises to be used for such ingress or egress shall be forfeited to the United States. Thus if the appellant had owned this property, the property

itself would have been forfeited to the United States. Appellant's leasehold interest was forfeitable under Section 2833 but was valueless. Can it be said that it is a proper construction of Section 2800(d) that appellant, who suffered, permitted and connived at the conduct of an illicit distillery upon his property, was considered by Congress as sufficiently interested in the use of the still to cause Congress to forfeit his interest in the property, but that Congress did not consider him as sufficiently interested in the use of the still to make him liable for taxes? It is apparent from the amendment of Senator Morrill that Congress intended that this language—"in any manner interested", should be construed broadly.

THE DOCTRINE OF EJUSDEM GENERIS IS NOT APPLICABLE.

The form of the phrase precludes the application of the rule. The statute established two classes: proprietors or possessors of stills *and* every person in any manner interested in the use of a distillery. It is apparent that the second phrase *describes* a class or genus. It is more than a "general word" which, following a number of words describing species within a class must be considered as covering all unnamed species within the same class. Such general words are almost universally preceded by the word "other" in those cases where the doctrine of *ejusdem generis* is applied. In the statute at hand we have two classes described; the second class is larger than the first and has a definite and clear meaning not dependent

upon the existence of the "specie" words "proprietors" or "possessors".

Assuming, however, that the form permits of the application of the rule, it must be remembered that the doctrine of *ejusdem generis* is only a rule of construction to be applied as an aid in ascertaining the legislative intent, and cannot control where the plain purpose and intent of the legislature would thereby be hindered or defeated.

59 *Corpus Juris* 982, Sec. 581.

The restricted use of the rule is well expressed by Mr. Justice Sutherland in *Mason et al. v. United States* (1923), 260 U. S. 545 at page 554, as follows:

> "The rule is one well established and frequently invoked, but it is, after all, a rule of *construction,* to be resorted to only as an aid to the ascertainment of the meaning of doubtful words and phrases, and not to control or limit their meaning contrary to the true intent. It cannot be employed to render general words meaningless, since that would be to disregard the primary rules, that effect should be given to every part of a statute, if legitimately possible, and that the words of a statute or other document are to be taken according to their natural meaning. Here the supposed specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate."

As Mr. Justice Van Devanter stated in *Danciger et al., Doing Business as Danciger Brothers v. Cooley* (1919), 248 U. S. 319 at page 326, in construing a statute employing somewhat similar language and construction:

"The first, as before quoted, says:

'Any railroad company, express company, or other common carrier, or any other person who, in connection with the transportation of any * * * intoxicating liquor * * * from one State * * * into any other State, * * * shall collect the purchase price or any part thereof, before, on, or after delivery, from the consignee, or from any other person, * * * shall be fined,' etc.

The words 'any railroad company, express company, or other common carrier', comprehend all public carriers; and the words 'or any other person' are equally broad. When combined they perfectly express a purpose to include all common carriers and all persons; and it does not detract from this view that the inclusion of railroad companies and express companies is emphasized by specially naming them. To hold that the words 'or any other person' have the same meaning as if they were 'or any agent of a common carrier' would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose. The rule that where particular words of description are followed by general terms the latter will be regarded as applicable only to persons or things of a like class is invoked in this connection, but it is far from being of universal application, and never is applied when to do so will give to a statute an operation different from that intended by the body enacting it. Its proper office is to give effect to the true intention of that body, not to defeat it."

WEBSTER'S DEFINITION OF "INTEREST".

"Interest" as defined in Webster's New International Dictionary, Second Edition (1937) has ten different meanings, two of which are as follows:

> "1. A right, title, share, or participation in a thing, as, formerly, in the production of an effect; specif., participation in advantage, profit, and responsibility; as, an *interest* in a bakery. Hence, that in which one has such an *interest,* esp., business affairs; business; as, his *interests* are in silk imports.
>
> 2. Concern, or the state of being concerned or affected, esp. with respect to advantage, personal or general; hence, good, regarded as a selfish benefit; profit; benefit."

Appellant chooses but one meaning for the word "interest" which is not used in the statute. The word used in the statute is "interested".

"Interested" is defined as follows:

> "1. Having the attention engaged; having emotion or passion excited; as, an *interested* listener.
>
> 2. Having an interest; having a share or concern in some project or affair; involved; liable to be affected or prejudiced; as, an *interested* witness; having self-interest; not disinterested; as, generosity proceeding from *interested* motives."

That Congress intended that this broad adjective should be given a broad meaning is evidenced by the use of the broad phrase "in any manner".

THE VAN SLYKE CASE.

The Court permitted the *Van Slyke* case to go to the jury. The Court, therefore, believed that there was sufficient evidence for the jury to find that the interest of Van Slyke made him liable under the provisions of Section 2800(d). The Court's instruction does not disclose this evidence. It is not apparent whether or not the rental was so excessive as to constitute a financial interest other than a lessor's interest. It is not apparent what evidence caused the United States Attorney to contend that the lease and contract were documents used to cloak a more substantial interest than the interest of a lessor. It is not apparent what showing was made that Van Slyke knew of the illicit operation in an otherwise lawfully operated, registered and bonded distillery, although the Court instructed the jury to consider this knowledge in determining Van Slyke's interest. There was apparently no showing that Van Slyke deliberately connived with his lawful lessees to commit unlawful acts. There was apparently no showing that Van Slyke was entitled to the immediate possession of the premises, as appellant was, had he cared to enforce the covenant against the illegal use of his property.

In the *Van Slyke* case the Court and jury considered a registered and bonded enterprise from which the lessor could lawfully accept rent to permit the conduct of an apparently lawful business on property which he held for his bank; property which had been forfeited to the United States previous to the action for taxes. In this case the Court has under

consideration an unlawfully established and operated enterprise from which appellant could not lawfully accept rent to permit the conduct of the unlawful business on his property.

In the *Van Slyke* case there was a lawful business tainted with illegal conduct. In the case at bar there is an unlawful enterprise with the sole appearance of legality consisting of a lease prepared to successfully consummate the illegality.

In the *Van Slyke* case the burden of proof was upon the plaintiff, the United States. In the case at bar the burden of proof was upon the appellant.

U. S. Fidelity & Guaranty Co. v. United States (CCA—2, 1912), 201 Fed. 91, 92;
Mayes v. Casey, 252 Fed. 754.

DOYLE v. SCOTT, ET AL.

This case cited by appellant for his proposition that excessive rental does not make him "a person in any manner interested in the use of any still, etc." is not applicable authority. The obvious purpose of the Texas statute was to require a revelation of all persons who were in control of the business of liquor dealing. It was a regulatory measure for the control of the liquor business. The purpose of the statute did not require the revelation of persons interested unless they controlled the business or shared the control. The statute under consideration is a tax measure obviously designed to make liable for taxes all persons who benefit financially from the operation or enable others to evade taxes.

RICHTER v. HENNINGSAN.

The case of *Richter v. Henningsan,* 110 Cal. 530, is not authority for the proposition cited by plaintiff. This case, as does the case of *United States v. Wolters et al.,* supra, holds that a stockholder, although not a proprietor or possessor, is interested in the operation of the still. The case is not authority for the proposition that a pecuniary interest is necessary to establish an interest in the still within the meaning of Section 2800(d).

Appellee submits that under the authorities cited above as applied to the findings of the trial Court based upon the evidence adduced at the trial the appellant was a person in "any manner interested in the use of a still, etc." within the meaning of the statute under discussion.

CONCLUSION.

Appellee, therefore, respectfully submits that the judgment of the District Court be affirmed.

Dated, San Francisco,
July 10, 1940.

Respectfully submitted,

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